(2)

Supreme Court, U.S.
FILED

No. 94- 931987 JUN 13 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

VANESSA RUIZ,
Acting Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

*EDWARD E. SCHWAB,
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
Sixth Floor
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3305

**Counsel of Record*

$4 PP

TABLE OF CONTENTS

Page

Opinion of the District of Columbia Court of Appeals (March 15, 1994) 1a

Judgment of the District of Columbia Court of Appeals (March 15, 1994) 28a

Memorandum Opinion and Order of the Superior Court of the District of Columbia, granting summary judgment to the District of Columbia and to the other defendants (Feb. 18, 1992) 30a

Opinion of the District of Columbia Court of Appeals in *Marion S. Barry, Jr. v. American Telephone and Telegraph Co.* (July 18, 1989) 52a

District of Columbia Statutes:

District Court of Columbia Code (1989 Supp.)

§ 47-2501 ..... 71a
§ 47-1508 ..... 74a
§ 47-2005 ..... 76a
§ 47-2006 ..... 76a

D.C. Law No. 7-25 (Oct. 1, 1987) 76a

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

District of Columbia Court of Appeals

No. 91-TX-846

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS INC., METROMEDIA COMMUNICATIONS CORPORATION NEE CSI NEE ITT, METROCOM NEE TMC, REALCOM OFFICE COMMUNICATIONS, INC. NEE CONTEL, ALLNET COMMUNICATION SERVICES, INC., MID-ATLANTIC TELECOM, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC., APPELLANTS,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-252

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS, INC., METROMEDIA COMMUNICATIONS CORPORATION, CONTEL OFFICE COMMUNICATIONS, INC., ALLNET COMMUNICATION SERVICES, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC., APPELLANTS,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-288

ALLNET COMMUNICATION SERVICES, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-289

CABLE & WIRELESS COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-338

CONTEL OFFICE COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-373

AMERICAN TELEPHONE & TELEGRAPH COMPANY, AT&T COMMUNICATIONS OF WASHINGTON, D.C., APPELLANTS,

v.

DISTRICT OF COLUMBIA, APPELLEE.

No. 92-TX-576

METROMEDIA COMMUNICATIONS CORPORATION, APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-577

CABLE & WIRELESS COMMUNICATIONS, INC., APPELLANT,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

No. 92-TX-578

RICHARD J. RICE, INC., APPELLANT

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, APPELLEES.

Appeals from the Superior Court of the District of Columbia

(Hon. John F. Doyle, Motions Judge)

(Argued October 20, 1993 Decided March 15, 1994)

Joseph A. Reiser and *William Malone*, with whom *John M. Wood*, *Mitchell F. Brecher*, and *Russell M. Blau*, were on the brief, for appellants.

Edward E. Schwab, Assistant Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees.

Before ROGERS, *Chief Judge*, and FERREN and FARRELL, *Associate Judges*.

Per Curiam Opinion for the court.

Concurring opinion of *Associate Judge* FARRELL at 27.

PER CURIAM: These seven consolidated appeals represent the continuation of litigation by long-distance telephone companies challenging the D.C. Gross Receipts Tax Amendment Act of 1987 (the 1987 Act). *See Barry v. American Tel. & Tel.*

Co., 563 A.2d 1069 (D.C. 1989). Appellants here[1] contend that the motions judge erred as a matter of law in granting summary judgment to the District of Columbia. Thus, we are confronted with appellants' contentions that the Council of the District of Columbia lacked the authority to enact the 1987 Act under the Origination Clause of the United States Constitution, and that the 1987 Act violates the Commerce Clause of the Constitution because the limited exemption of long-distance companies from the District's personal property tax, and certain sales and use taxes, discriminates against out-of-District of Columbia carriers. We hold that the Council had the authority to enact the 1987 Act. We further hold, consistent with recent decisions of the United States Supreme Court involving the internal consistency principle, that the limited exemptions in the 1987 Act violate the Commerce Clause. Accordingly, we reverse the grant of summary judgment.[2]

I.

The background of this tax litigation, which followed AT&T's divestiture of its local operating companies in connection with the antitrust suit in *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983), is set forth in *Barry v. American Tel. & Tel.*

---

[1] A joint brief and reply brief were filed, only on behalf of appellants Sprint Communications Co., Cable & Wireless, Metromedia, MetroCom, RealCom, Mid-Altantic, ALLNET, AT&T, and Long Distance Service of Washington, Inc. Except in Appeal No. 92-TX-373, appellees are the Mayor, the Director of the Department of Finance and Revenue, and the District of Columbia; we refer to appellees as the District of Columbia, or the District.

[2] In light of our disposition we do not reach appellants' contention that the retroactivity provision of the 1987 Act violates the Due Process Clause, and that the trial court (Judge Sullivan) erred in dismissing their motions to amend their complaint, under Super. Ct. Civ. R. 15, to show prepayment of the tax by Cable & Wireless Communications, Inc.

Co., supra, 563 A.2d at 1070-1073. For our purposes it suffices to state that the Council of the District of Columbia enacted the D.C. Gross Receipts Tax Amendment Act of 1987 in an attempt to recapture revenues that it had to refund as a result of the divesture of AT&T in January, 1984.[3] The 1987 Act required telecommunications companies previously exempt from the gross receipts tax to pay a 6.7 percent tax on gross receipts received from the sale of toll communications services that originated from or terminated on telecommunications equipment located in the District of Columbia and billed to a District telephone.[4] The 1987 Act also provided for

---

3 The District government estimated that as of 1986, the exclusion of access charges from taxation as gross receipts under D.C. Code § 47-2507 (Supp. 1986), *see District of Columbia v. Chesapeake & Potomac Tel. Co.*, 516 A.2d 181 (D.C. 1986) (gross receipts from access charges are not from sale of public utility commodities and services), resulted in a revenue loss of approximately $23.6 million. *See* REPORT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON FINANCE AND REVENUE ON BILL 7-186, GROSS RECEIPTS TAX AMENDMENT ACT OF 1987, at 7 (June 29, 1987). Under the 1987 Act, the District anticipated recovering about $20 million from the retroactive portion of the tax and collecting approximately $18.5 million annually thereafter. *Id.* at 7-8.

4 D.C. Code § 47-2501 (b)(1) (Supp. 1989) provides, in part, that all telecommunications companies were required to pay a 6.7 percent tax on the

> monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received.

The tax was self-executing; every month the companies had to file an affidavit with the Mayor setting forth the amount of monthly gross receipts on which payment of the tax was to be made. *Id.* § 47-2501 (b)(1)(A).

exemptions from the District's personal property tax, and certain sales and use taxes, whenever a company had property in the District of Columbia that produced gross receipts subject to the gross receipts tax.[5] It also provided for a credit against the gross receipts tax for personal property taxes on such property paid to the District of Columbia during the period of retroactivity, July 1, 1986, through September 30, 1987.[6]

Following argument, the motions judge granted the District's motion for summary judgment, issuing a written decision on February 18, 1992.[7] *See Cable & Wireless Communications, Inc. v. District of Columbia*, Tax No. 4091-88 (D.C. Super. Ct. Feb. 18, 1992) (Opinion of Judge Doyle). Appellants now contend that the Gross Receipt Tax Amendment Act of 1987 is unconstitutional on three grounds: (1) it was enacted by the Council of the District of Columbia in violation of the

---

5 *See* D.C. Code §§ 47-1508 (a)(3)(B); -2005 (5); -2206 (1) (Supp. 1989). *See infra* note 18.

6 *See* D.C. Code §§ 47-2501 (b)(3)(B), (C); -2005(5); and -2206 (Supp. 1989). The 1987 Act was superceded by the D.C. Toll Telecommunications Act of 1989. *See* D.C. Code §§ 47-3901 to 3921, -2005 (5), -1508 (a)(3)(B), -2501 (Supp. 1990). The 1989 Act added provisions crediting taxes paid to other jurisdictions on long distance calls and facilitating the means of determining data necessary for computing the tax. D.C. Code § 47-3907 (Repl. 1989). The 1992 Omnibus Budget Support Act of 1992, 39 D.C. Reg. 4895, D.C. Law 9-145, repealed the personal property tax exemption.

7 The District of Columbia filed a motion to dismiss the litigation that was still subject to the remand and direction to vacate in *Barry v. American Tel. & Tel. Co.*, *supra*, 563 A.2d at 1070, because the carriers had not complied with § 47-3307's "pay first and litigate later" rule. On June 6, 1991, Judge Sullivan granted the District's motion to dismiss. The non-AT&T appellants appealed, but this court postponed consideration of Judge Sullivan's order pending consideration of the cross-motions for summary judgment filed after AT&T's post-tax payment refund suit. Judge Sullivan transferred the consolidated cases to Judge Doyle to consider the cross-motions for summary judgment.

Origination Clause of the United States Constitution; (2) it violates appellants' right under the Commerce Clause to be free of discriminatory burdens on out-of-state competitors; and (3) it violated Due Process as a result of its retroactivity provisions in light of the foreclosure to appellants under federal law of recovery of the tax from their customers.[8] We address only the first two contentions.[9] *See Holland v. Hannon*, 456 A.2d 807, 814 (D.C. 1983) (standard of review of grant of summary judgment).

II.

Appellants contend that the 1987 Act was unconstitutional because it violated the Origination Clause in two respects: first, because the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code §§ 1-201 *et seq.* (Repl. 1992), originated in the Senate as S. 1435, 93d Cong., 1st Sess (1973), the delegation of taxing authority to the District government did not satisfy the requirement of House of Representatives origination; and second, because the Origination Clause has always been understood to apply to District of Columbia taxes, the 1987 Act is invalid.

The motions judge correctly rejected these arguments. The Origination Clause of the Constitution, art. I, § 7, cl. 1, provides that "[a]ll bills for raising revenue shall originate in the House of Representatives." As Judge Doyle observed in his opinion, the provision derived from the British tradition that money bills must originate in the House of Commons, not the House of Lords.[10] Further, the provision has never prevented

---

8 Two notices of appeal therefrom were filed, a joint appeal by the non-AT&T appellants on March 6, 1992, and one by the AT&T appellants on March 18, 1992.

9 We address the Origination Clause argument because of our conclusion that the District of Columbia may yet remedy the Commerce Clause defect in the 1987 Act.

10 Opinion of Judge Doyle, *supra*, at 9 n.7 (citing (actual cite now)

delegations of taxing authority to the District of Columbia or to the territorial governments.[11] Indeed, as the District of

---

3 THE NEW ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA, *House of Commons*, 43 (1981)).

[11] Opinion of Judge Doyle, *supra*, at 10. Thus, from its beginnings, the city of Washington, a municipal corporation, was given the "full power and authority to pass all by-laws and ordinances," and the power "to lay and collect taxes." Act of May 3, 1802, Incorporating the City of Washington, ch. 53, 2 Stat. 195, 197; *see also* Act of May 4, 1812, Amending the Charter of Washington, ch. 75, 2 Stat. 721, 725; Act of July 1, 1812, relative to the Levy Court of Washington County, ch. 117, 2 Stat. 771, 772. Later reorganizations by Congress delegated authority to the District government to enact tax measures. *See* Act of May 15, 1820, Reorganization of the Government of the City of Washington, ch. 104, 3 Stat. 583, 586-588; Act of May 17, 1848, Reorganizing the Government of the City of Washington, ch. 42, 9 Stat. 223-224; Act of Feb. 21, 1871, To Provide a Government for the District of Columbia, ch. 62, 16 Stat. 419, 422-25, 427.

See also Act of Mar. 26, 1804, ch. 38, 2 Stat. 283, 284 (splitting Louisiana territory into two territories); Act of Apr. 20, 1836, ch. 54, 5 Stat. 10, 15 (establishing Wisconsin territory); Act of June 12, 1838, ch. 96, 5 Stat. 235, 237 (establishing Iowa territory); Act of Aug. 12, 1848, ch. 177, 9 Stat. 323, 325 (establishing Oregon territory); Act of Mar. 3, 1849, ch. 121, 9 Stat. 403, 405 (establishing Minnesota territory); Act of Sept. 9, 1850, ch. 49, 9 Stat. 446, 449 (establishing New Mexico territory); Act of Sept. 9, 1850, ch. 51, 9 Stat. 453, 454 (establishing Utah territory); Act of Mar. 2, 1853, ch. 90, 10 Stat. 172, 175 (establishing Washington territory); Act of May 30, 1854, ch. 59, 10 Stat. 277, 279 (establishing Nebraska and Kansas territories); Act of Feb. 28, 1861, ch. 59, 12 Stat. 172, 174 (establishing Colorado territory); Act of Mar. 2, 1961, ch. 83, 12 Stat. 209, 211 (establishing Nevada territory); Act of Mar. 2. 1861, ch. 86, 12 Stat. 239, 241 (establishing Dakota territory); Act of Feb. 24, 1863, ch. 56, 12 Stat. 664, 665 (establishing Arizona territory with same powers as New Mexico territory); Act of Mar. 3, 1863, ch. 117, 12 Stat. 808, 810 (establishing Idaho territory); Act of May 26, 1864, ch. 95, 13 Stat. 85, 88 (establishing Montana territory); Act of July 25, 1868, ch. 235, 15 Stat. 178, 180 (establishing Wyoming territory); Act of May 2, 1890, ch. 182, 26 Stat. 81, 84 (establishing

Columbia points out in its brief, the delegation of legislative authority under the D.C. Self-Government act, *see* D.C. Code § 1-204, quoted *infra*, is virtually identical to that in the District's Organic Act of 1871, ch. 62, 16 Stat. 419, 423, and substantially like the legislative powers of the territorial governments. *See supra* note 11 and *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105 (1953) (analogizing the delegation of legislative power under the Act of 1871 to similar grants to territorial governments).

The significance of these delegations, as the District points out, arises from the fact that such delegations to subordinate governments of taxing power predated the Constitution, and their continuance by the First Congress clearly demonstrates that the Origination Clause applies only to tax measures to finance the general government.[12] Thus, the purpose of the Origination Clause, relating to the distribution of power within Congress, was to give to the immediate representatives of the people "the primary role in raising revenue" to

---

Oklahoma territory); 48 U.S.C. § 1574 (a) (1988) (establishing Virgin Islands territory).

12 *See* Ordinance for the Government of the Territory of the United States north-west of the river Ohio, Art. IV (July 13, 1787) (Northwest Territory), *reprinted in* Act of August 7, 1789, Ch. 8, 1 Stat. 50, 52 n.(a); Act of August 7, 1789, Ch. 8, 1 Stat. 50 (adapting Northwest Ordinance to present Constitution, but making no change in the power of the territorial government to tax). *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) ("[t]he construction placed upon the Constitution by the [First Congress], by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight"); *Cohens v. Virginia*, 19 (6 Wheat.) 264, 418 (1821) ("[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816) (paying special attention to contemporaneous interpretation of the Constitution).

finance the general, federal government.[13] *See United States v. Munoz-Flores*, 495 U.S. 285, 394-95 (1990) (citing THE FEDERALIST No. 58). Consequently, we agree with the District that the grant to citizens of the District of Columbia, who have no voting representative in Congress, of the power to enact local taxes is fully consistent with the Founding Fathers' intention that there would be self-government for citizens of the seat of government. *See* THE FEDERALIST No. 43, at 282 (James Madison) (Paul L. Ford ed., 1898).

The D.C. Self-Government Act provides that:

> Except as provided in §§ 1-206, 1-233, 47-313, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the

---

[13] The District of Columbia suggests that this was done so as to avoid a chief grievance that led to the American Revolution: taxation without representation. *See* W. BENTON, 1787: DRAFTING OF THE U.S. CONSTITUTION, 741, 781 (1986). This purpose is outlined in THE FEDERALIST No. 58, at 386-87 (Alexander Hamilton) (Paul L. Ford ed., 1898):

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

> states by the 10th section of the 1st article of the Constitution of the United States.

D.C. Code § 1-204 (Repl. 1992). The chairman of the Senate District Committee, who was also the manager of the bill in the Senate, explained that by this legislation it was intended, with exceptions for taxation of federal property and enactment of an income tax on nonresidents, that the elected Mayor and Council of the District of Columbia "can decide in what way and how much to tax their citizens, can enact local ordinances into law, and can begin to shape their own destiny as should be the right of all American citizens." 119 Cong. Rec. 22947 (1973) (Senator Eagleton).[14]

We reject appellants' argument that because the D.C. Self-Government Act provides the source of the local

---

[14] As Judge Doyle pointed out in his opinion at 9, this court has rejected a restrictive view of the delegation of legislative authority under the Self-Government Act while preventing any intrusion by the Mayor and Council into specifically forbidden areas. *Compare District of Columbia v. Greater Washington Labor Council*, 442 A.2d 110, 115 (D.C. 1982) ("transfer by Congress of certain public employment services from United States Department of Labor to the District government, in the absence of a concurrent transfer of private employment work[ers'] compensation . . . does not reflect a congressional intent to prohibit the local government from legislating with respect to private work[ers'] compensation"; former involved federal statute not applicable exclusively to the District of Columbia while latter did), *cert. denied*, 460 U.S. 1016 (1983), *and McIntosh v. Washington*, 395 A.2d 744, 753 (D.C. 1978) (delegated authority extends to all rightful subjects of legislation), *with Bishop v. District of Columbia*, 411 A.2d 997, 998 (D.C. 1980) (en banc) (repeal of professional exemption to the unincorporated business tax and imposition of a tax on nonresident unincorporated professionals and personal service business "was impermissible exercise of the District of Columbia Council's authority under § 602 (a) of the [Self-Government] Act," which included express prohibition of "imposition of any tax on the whole or any portion of personal income . . . of any individual not a resident of the District," D.C. Code § 1-147 (a)(5) (Supp. 1978)), *cert. denied*, 446 U.S. 966 (1980).

government's taxing authority, that law had to originate in the House of Representatives. The term "revenue bill," for Origination Clause purposes, refers only to bills that "'levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.'" *United States v. Munoz-Flores, supra*, 495 U.S. at 397 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)) (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 880, pp. 610-11 (3d ed. 1858)). Consequently, "a statute that creates a particular government program and that raises revenues to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Id.* at 398. In *Twin City Bank v. Nebeker, supra*, 167 U.S. at 202-03, the Supreme Court determined that the test for whether a particular bill is a revenue bill rests upon the bill's "main purpose." *See United States v. Wilson*, 901 F.2d 1000, 1004 (11th Cir. 1990) ("where the purpose of an act is 'to raise revenue to be applied in meeting the expenses or obligations of the government,' the act is a revenue measure subject to the origination clause. Where the main purpose of the act is other than raising revenue, it is not subject to challenge under the origination clause") (quoting *United States v. King*, 891 F.2d 780, 781 (10th Cir. 1989)).

The D.C. Self-Government Act is not a "revenue bill" within the meaning of the Origination Clause. Generating revenue for the United States government and its operations was clearly not its "main purpose." Rather, the principal purpose of the Self-Government Act was to provide a measure of self-government for the citizens of the District of Columbia by creating a representative form of local government. *See* S. REP. No. 93-219, 93d Cong., 1st Sess. 1 (1973) ("[t]he purpose of [the Self-Government Act] is to enact a District of Columbia Charter Act and thereby restore to the citizens of the District of Columbia some measure of self-government"); D.C. Code 1-201 (a) (Repl. 1992) ("the intent of Congress is to delegate certain legislative powers to the government of the

District of Columbia, . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters"). Revenues derived from a tax enacted by the Mayor and D.C. Council pursuant to the authority delegated under the Self-Government Act are not generally available for defraying the expenses and obligations of the United States government in connection with its national responsibilities and activities, but are for use by the government of the District of Columbia in support of the activities of the local government.[15] *See* D.C. Code § 47-301 (a)(1) (Repl. 1990). Any support of national activities is purely "incidental." *See United States v. Munoz-Flores, supra*, 495 U.S. at 399.[16] Since the principal purpose of the Self-Government Act was not to raise revenues for the general government, it could not have been enacted in violation of the Origination Clause. *Id.*

Nor does the 1987 Act, a bill for raising revenue for the District of Columbia, violate the Origination Clause because it did not originate in the House. A contrary holding would

---

[15] Generally, in states that have such provisions in their state constitutions, laws delegating authority to local government units to levy and collect taxes for local purposes are not considered bills for "raising revenue" within the meaning of the Origination Clause. *See* F.G. Madara, Annotation, *Application of Constitutional Requirement That Bills for Raising Revenue Originate in Lower House*, 4 A.L.R.2d 973, 984-86 (1949) (citing *Rankin v. Henderson*, 7 S.W. 174 (1888)).

[16] Appellants rely on the statement in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989), that "the Origination Clause . . . implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power *once a tax bill has been properly enacted*" (emphasis added). But *Skinner*, which merely applied the familiar standard for congressional delegation of authority to an administrative agency, has nothing to say about the authority of Congress, consistent with the Constitution, to delegate broad governmental authority — including the power to tax for local purposes — to territorial and other subordinate entities such as the District of Columbia government.

ignore the purpose of the Origination Clause, described above, and the history of delegations of taxing authority to the territorial and local District of Columbia governments. In *Milliard v. Roberts*, 202 U.S. 429 (1906), the Supreme Court held that an act of Congress originating in the Senate that taxed District of Columbia land to carry out public improvements in the District was not a "revenue bill" within the meaning of the Origination Clause, but rather the "means to the purposes provided by the act." *Id.* at 437. The act at issue in *Milliard* was clearly a District of Columbia tax to which appellants presumably would argue the Origination Clause applies; but the Supreme Court held otherwise. Like the statute in *Milliard*, the taxing authority delegated to the District of Columbia is merely the means by which the District government is to carry out its self-governing, not a means to raise revenues for the United States. The Origination Clause simply does not apply to tax measures enacted pursuant to a delegation by Congress of taxing powers to the District or similar governments to carry out their local government functions.

Appellants maintain in their Reply Brief that whether the 1987 Act violates the Origination Clause "may come down to exactly what taxing authority the Congress intended to delegate to the D.C. Council." They posit that Congress did not intend to give the District of Columbia "carte blanche" taxing authority under D.C. Code § 1-204, and that the general language of § 1-204 does not apply to a matter, in this case taxing authority, specifically dealt with in another part of the same statute. Appellants suggest that Congress made known its true intent regarding taxing authority by specifically granting authority over existing real and personal property taxes (§ 47-501), and changes in the rates of taxes previously enacted by Congress (§ 47-504) in other provisions of the Self-Government Act, now codified in Title 47 (Taxation and Fiscal Affairs). We disagree.

First, because § 1-204 was enacted in connection with a fundamental reorganization of the District government and is

a broad delegation of legislative authority occurring after the enactment of § 47-501 and § 47-504, the general language of the Self-Government Act controls the language of legislation that preceded it. The limitations on the District government's taxing authority under the Self-Government Act are expressly stated in the Self-Government Act. *See* 1 D.C. Code at 226-27 (Repl. 1991) (§ 602 of the Self-Government Act, codified as D.C. Code § 1-233); *cf. McIntosh v. Washington*, *supra* note 14, 395 A.2d at 754 (if Congress had intended to limit the broad grant of legislative authority under the Self-Government Act, it would have so stated in the statute or legislative history).[17] The provisions of § 47-501 and § 47-504 were simply modified by the codifiers following the enactment of the Self-Government Act, to refer to the new, elected Council of the District of Columbia. *See* D.C. Code §§ 47-501 (codifier's notation "Change in government"); -504 (same). On their face, § 47-501 and § 47-504 do not preclude any other taxation by the District of Columbia.

Second, volume 11 of the D.C. Code (Repl. 1990) lists the provisions of the D.C. Self-Government Act codified in Title 47 of the D.C. Code. A review of those provisions indicates that they pertain to the District's budget process, the general fund, the issuance of general obligation bonds and revenue bonds, borrowing, and audits by the General Accounting Office. These provisions place no limitation on the District's taxing authority under the Self-Government Act. In addition, § 47-501 and § 47-504, mentioned specifically by appellants, chronologically preceded enactment of the Self-Government

---

[17] Thus, appellants' reliance on *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1957), is misplaced because in that case, unlike the fundamental governmental restructuring and broad delegation of authority under the Self-Government Act, the Court's conclusion about the statute regarding venue for patent infringement claims rested on the absence of a substantive change in the statute at issue and of an alteration to the scope and purpose of the enactment of the statute. 353 U.S. at 225, 227.

Act and therefore cannot be read as having any effect on the delegation of legislative authority under D.C. Code § 1-204.

Third, to adopt appellants' argument would contradict the statutory scheme of the Self-Government Act, premised in part on the requirement that the District government present a balanced budget to Congress, supported by necessary revenue measures. *See* 1 D.C. Code § 442 (a)(1) at 202-203 (Repl. 1991), codified as D.C. Code § 47-301 (a)(1)).

Therefore, appellants' challenges to the delegation of taxing authority by the Self-Government Act and to the 1987 Act itself as violative of the Origination Clause must fail.

III.

Appellants' primary contention, however, is that the 1987 Act, by combining the gross receipts tax with exemptions and credits against personal property and certain sales and use taxes only when the latter are paid to the District of Columbia, impermissibly discriminates against long-distance telephone carriers not based in the District of Columbia, in violation of the Commerce Clause of the United States Constitution. Under the 1987 Act, a long-distance carrier is exempt from the District of Columbia's personal property tax, and certain sales and use taxes, to the extent that the carrier's property in the District of Columbia is used to produce gross receipts subject to the 1987 Act.[18] When, by con-

---

[18] The 1987 Act provides exemptions for the following personal property tax, and sales and use taxes, from the gross receipts tax imposed:

> The personal property of any telecommunications company . . . used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District . . . . D.C. Code § 47-1508 (a)(3)(B) (Supp. 1989);
>
> Sales of property purchased by a telecommunication company . . . for use or consumption in

trast, carriers (such as appellants) located outside of the District of Columbia use property to produce revenues subject to the 1987 Act, they receive no offset against the gross receipts tax for personal property, sales, and uses taxes paid to their home jurisdiction.[19]

Appellants contend that the exemptions and credits in the 1987 Act place long distance telephone companies located outside the District at a substantial commercial disadvantage. In their view the tax scheme in the 1987 Act is unconstitutional because "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987). We are compelled to agree.

The Commerce Clause, art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce . . . among the several States." Although it is silent about regulation of interstate commerce by States in the absence of Congressional legislation, the Supreme Court has read the Clause as a limit on state power. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). To ensure "an area of free trade among the

---

> furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipt tax or mileage tax in force in the District . . . . D.C. Code § 47-2005 (5) (Supp. 1989);
>
> Sales upon which taxes are properly collected under the [District of Columbia Gross Sales Tax provisions] . . . . D.C. Code § 47-2206 (1) (Supp. 1989).

[19] Similarly, to the extent that a long distance carrier located in the District of Columbia uses its property located here to produce revenues outside of the District of Columbia (hence not subject to the District's gross receipts tax), it receives no exemption from other District of Columbia taxes.

several states," the Supreme Court has held that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Id.* at 329 (citations omitted). When a state tax is challenged as constituting a violation of the Commerce Clause, the test employed by the Supreme Court is whether the tax: (1) applies to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) discriminates against interstate commerce; and (4) is fairly related to services or benefits provided by the states. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1912 (1992); *Goldberg v. Sweet*, 488 U.S. 252, 259-60 (1989). Only the third prong is at issue in this case.[20]

Under the anti-discrimination component of the *Complete Auto, supra*, test, a tax discriminates against interstate commerce if it is "facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75 (1989). Appellants contend that the taxing and exemption provisions of the 1987 Act, in combination, facially discriminate against carriers located outside the District which generate revenues here, contrary to the requirement of "internal consistency" as applied in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987).

The internal consistency principle was originally applied by the Supreme Court in fair apportionment cases under the Commerce Clause.[21] "The first . . . component of fairness in

---

[20] Appellants do not challenge the 1987 Act under the first, second, and fourth prongs of the *Complete Auto Transit, Inc. v. Brady, supra*, test. *See Goldberg v. Sweet, supra*, 488 U.S. at 267-268 (holding that Illinois excise tax satisfied the *Complete Auto* test).

[21] Apportionment analysis requires that once a certain set of activities is determined to constitute a "unitary business," a state

an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed." *Container Corp., supra* note 21, 463 U.S. at 169. In *Armco*, however, the Court for the first time extended the principle to a case involving a claim of facial discrimination against interstate commerce. The Court invalidated a West Virginia gross receipts tax which "[o]n its face . . . appear[ed] to" tax a transaction or incident "more heavily when it crosses state lines than when it occurs entirely within the state." 467 U.S. at 642. Specifically, West Virginia's gross receipts tax exempted from its reach receipts from the sale of products manufactured in the State but not otherwise. The State argued that exempting resident manufacturers was necessary to compensate for the fact that they were subject to a manufacturing tax West Virginia also imposed, which was inapplicable to out-of-state manufacturers. In rejecting this argument, the Court carried over to the facial discrimination context the test of *Container Corp., supra* note 21, that a tax "'must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Id.* at 644.[22] The forbidden discrimination in *Armco* was revealed by the fact that "[i]f Ohio [where Armco was located] or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then Armco and others from out of State will pay both a manufacturing tax and a wholesale

---

must fairly apportion the income of the business within and outside of the state. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

22 As the Court explained in a later decision, "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Goldberg v. Sweet, supra*, 488 U.S. at 261.

tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* It was irrelevant to the Court whether another state *in fact* "imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia," *id.*, for otherwise "the validity of the taxes imposed on each taxpayer would depend on the [tax schemes of the] particular other States in which it operated." *Id.* at 645 (footnote omitted).

The District's 1987 Act, unlike the tax in *Armco*, does not exempt local carriers from the gross receipts tax, but the distinction is immaterial as the Supreme Court soon made clear in *Tyler Pipe*. Originally the State of Washington had imposed a business and occupation (or B & O) tax upon (*inter alia*) wholesale sales within the State, but exempted from this tax persons subject to other forms of the B & O tax such as a manufacturing tax on products made within the State. Anticipating the *Armco* decision, the Supreme Court of Washington invalidated the tax on Commerce Clause grounds.[23] *See Tyler Pipe Indus., Inc., supra*, 483 U.S. at 235-36. The State then legislatively "turn[ed] the B & O tax exemption scheme inside out" by "remov[ing] the wholesale tax exemption for local manufacturers and replac[ing] it with an exemption from the manufacturing tax for the portion of the manufacturers' output that is subject to the wholesale tax." *Id.* at 236 (footnote omitted). This scheme resembles the District's 1987 Act which, while exempting no one from the gross receipts tax on covered toll communications services, provides an exemption from personal property (and other) taxes for District property which generates long-distance receipts subject to the gross-receipts tax.

The Supreme Court in *Tyler Pipe* struck down the State of Washington's new tax exemption as well, finding it "the practical equivalent of the exemption" previously invalidated by

---

[23] Indeed, the U.S. Supreme Court in *Armco* took note of the Washington Supreme Court's earlier decision "invalidating a Washington tax scheme identical to that here." 467 U.S. at 645 n.8.

the state Supreme Court (and invalid by implication under *Armco*). *Id.* at 241.

> A person subject to Washington's wholesale tax for an item is not subject to the State's manufacturing tax for the same item. This statutory exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*.

Id. at 240. Again the Court applied the requirement of internal consistency, pointing out that Washington's

> multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes *similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State.*

Id. at 246-47 (emphasis added).[24] The State's exemption scheme therefore discriminated against interstate commerce in that "[t]he current B & O tax exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." *Id.* at 248; *see also American Trucking Ass'ns v. Scheiner*, *supra*, 483 U.S. at 286-87 (under test of internal consistency and "our consistent course of decisions in recent years," Court invalidates Pennsylvania lump-sum axle tax, which "exert[ed] an inexorable hydraulic pressure on interstate [truckers] to ply their trade within the State that enacted the measure rather than 'among the several States'").

---

[24] As Justice Scalia pointed out in dissent, Washington's "exclusion . . . can only be deemed *facially* discriminatory if one assumes that every State's taxing scheme is identical to Washington's." 483 U.S. at 254 n.1 (Scalia, J., dissenting).

Applying *Armco*, *Tyler Pipe*, and *Scheiner*, we conclude that the tax scheme in the 1987 Act cannot withstand a Commerce Clause challenge. The District of Columbia argues in vain that the 1987 Act is not discriminatory because all carriers with personal property in the District that produces revenues subject to the gross receipts tax receive the same exemptions. This argument is unavailing. The discriminatory consequences of the 1987 Act arise from the circumstance that, if the same limited exceptions existed in every state, then out-of-state carriers would pay more than in-state carriers whenever the former had property subject to their home state's personal property tax but used to produce out-of-state revenues subject to another state's gross receipts tax. The fact that appellants have not shown that the taxing scheme in other jurisdictions would, in fact, create a greater tax burden for them than companies located in the District of Columbia is irrelevant. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 644; *American Trucking Ass'ns v. Scheiner*, *supra*, 483 U.S. at 285. Also irrelevant is the fact that appellants (except for one carrier which only leases property in the District of Columbia) have received exemptions from the District's personal property tax under the 1987 Act[25] and have not yet shown that, nevertheless, they have been subjected to heavier taxation because of the taxing schemes in other jurisdictions. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 644-45.[26] The

---

25 Judge Doyle found that "[a]ll of the [appellants] except Long Distance Services of Washington, Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund." Opinion of Judge Doyle, *supra*, at 18.

26 Although the District of Columbia argues that its gross receipts tax has historically been considered as in lieu of an ad valorem personal property tax, it does not maintain that the gross receipts tax and limited exemptions under the 1987 Act are valid "compensating taxes"; if it did, that argument would not survive application of the internal consistency principle in any event. *See Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 642-43, and *Tyler Pipe Indus., Inc.*, *supra*, 483 U.S. at 242-43.

Commerce Clause discrimination arises because the 1987 Act provides only a limited exemption, or credit, to the extent that the company uses personal property in the District of Columbia to produce those receipts. As appellants hypothesize:

> A company which concentrated its property in one state but provided services in many would pay a gross receipts tax on all of its receipts and a personal property tax (and sales and use taxes) on all but a small portion of its personal property. In contrast, a company which spread its property among the several states in proportion to the revenues derived therefrom — thereby becoming essentially equivalent to a "home operator" in each state — would pay a gross receipts tax but would not pay personal property taxes or sales or use tax *anywhere.*

Under *Tyler Pipe, supra,* 483 U.S. at 242-43, 246-48, the District of Columbia may not enact a tax scheme whereby the only company that can fully benefit from the available exemptions is one that sells in the District of Columbia only what it produces there, and does not afford the same benefits to a company outside of the District that sells within it or indeed to a District company that sells outside it. What is missing in the 1987 Act is "a credit to any taxpayer upon proof that the taxpayer has paid a tax in another State on the same [tax base] which triggered the [gross receipts tax under the 1987 Act]." *Goldberg v. Sweet, supra,* 488 U.S. at 256; *see Tyler Pipe Indus., Inc., supra,* 483 U.S. at 249.

By fully endorsing Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington, supra,* 377 U.S. at 451-62, the Supreme Court has apparently signaled in *Tyler Pipe* its preference for a method of taxation that eliminates all overlapping taxation, in favor of the "'federal free market trade unit.'" *General Motors Corp. v. Washington, supra,* 377 U.S. at 461 (quoting *H.P. Hood & Sons, Inc. v. Du Mond,* 336

U.S. 525, 538 (1949)).[27] On the other hand, the Court is not unanimous about the validity of the restrictive internal consistency principle of *Armco* and its progeny. Some members of the Court have suggested reasons to reexamine the Court's extension of the principle at least to state tax schemes that are not discriminatory on their face as in *Armco*.[28] In any event, the shifting ground is particularly unfortunate for the

---

[27] Justice Goldberg endorsed the statement of Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond, supra*, 336 U.S. at 538, that the Commerce Clause was designed "to create a 'federal free trade unit' — a common national market among the States; and the Constitution thereby precludes a state from defending a tax on interstate sales on the ground that the State taxes intrastate sales generally." 377 U.S. at 461. Justice Goldberg went on to write that:

> Nondiscrimination alone is no basis for burdening the flow of interstate commerce. The Commerce Clause "does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). A State therefore should not be enabled to put out-of-state producers and merchants at a disadvantage by imposing a tax to "equalize" their costs with those of local businessmen [or businesswomen] who would otherwise suffer a competitive disadvantage because of the State's own taxation scheme. The disadvantage stemming from the wholesale sales tax was created by the State itself and therefore the fact that the State simultaneously imposes the same tax on interstate and intrastate transactions should not obscure the fact that interstate commerce is being burdened in order to protect the local market.

Id.

[28] *See Goldberg v. Sweet, supra*, 488 U.S. at 270 (Justice O'Connor, concurring in part and concurring in the judgment); *id.* at 271 (Justice Scalia concurring in the judgment); *Tyler Pipeline*

District of Columbia, which enacted the 1987 Act in response to an upheaval in the telecommunications industry at a time when the internal consistency principle appeared limited to apportionment cases and facially discriminatory tax schemes such as those involved in *Armco*, so that the 1987 Act could reasonably have been held not to discriminate unfairly against interstate commerce. Moreover, this court is not in a position, as was the Supreme Court of the State of Washington upon having its tax scheme overturned in *Tyler Pipe Indus., Inc., supra*, to hold that the invalidation of the tax would be prospective only;[29] the Supreme Court has repudiated such civil prospectivity. *See Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (rejecting any view of retroactivity based on a *Chevron Oil* analysis and holding that "full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule") (citing *James B. Bean Distilling Co. v. Georgia*, 111 S. Ct. 1439, 2446 (1991) (holding that no court may refuse to apply retroactively a federal rule of law applied to the litigants)).

Consequently, in order to minimize the need to make refunds, *see Dennis v. Higgins*, 111 S. Ct. 865, 871 (1991) (citing

---

Indus., Inc., supra, 483 U.S. at 253 (Justice O'Connor, concurring); *id.* at 254 (Justice Scalia, with whom Chief Justice Rehnquist joins, dissenting); *American Trucking Ass'ns v. Scheiner, supra*, 483 U.S at 198 (Justice O'Connor, with whom Chief Justice Rehnquist and Justice Powell join, dissenting); *id.* at 303 (Justice Scalia, with whom Chief Justice Rehnquist joins, dissenting); *Armco, Inc. v. Hardesty, supra*, 467 U.S. at 646 (Justice Rehnquist dissenting). *See also* Walter Hellerstein, *"Is 'Internal Consistency' Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation,"* 87 MICH. L. REV. 138 (1988).

[29] *See National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash. 1988) (en banc) (upon applying the three factors of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), held that state law did not require refunds and prospective application of *Tyler Pipe Indus., Inc., supra*, was appropriate).

McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 31 (1990)), the Council of the District of Columbia would have to enact legislation, consistent with Commerce Clause principles, that, for example, would retroactively grant a credit against the gross receipts tax imposed under the 1987 Act for any personal property taxes paid to other jurisdictions on the same tax base, upon proof by the taxpayer of payment of such taxes to another jurisdiction.[30] *See Harper v. Virginia Dep't of Taxation, supra*, 113 S. Ct. at 2519-20 (dictum). Alternatively, the District government could collect the additional tax from appellants' competitors, or it could do a combination of both. *See McKesson Corp. v. Division of Alcoholic Beverages, supra*, 496 U.S. at 40-41.

Accordingly, because the limited exemptions under the 1987 Act impermissibly discriminate against interstate commerce, the 1987 Act is unconstitutional under the Commerce Clause, and we reverse the grant of summary judgment to the District of Columbia. We do not enter judgment for appellants, however, "because federal law does not necessarily entitle them to a refund," and the District of Columbia may "create[] in hindsight a nondiscriminatory scheme." *Harper v. Virginia Dep't of Taxation, supra*, 113 S. Ct. at 2519-20 (dictum) (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra*, 496 U.S. at 40).

---

[30] *See Welch v. Henry*, 305 U.S. 134, 147 (1938) (factors for determining the validity of retroactive taxation). *See also United States v. Hemme*, 476 U.S. 558, 567-71 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981).

FARRELL, *Associate Judge*, concurring: I join the court's opinion entirely and write only to express my view that the internal consistency principle, as a test for identifying forbidden commerce clause discrimination outside the fair apportionment context, should be reexamined. The reasons are essentially those stated by Justice Scalia in part I of his dissent in *Tyler Pipe*. See particularly 483 U.S. at 257-58. As applied here, the internal consistency rule says in effect that, for the District of Columbia constitutionally to adopt the means it has for preventing *double* taxation of local telecommunications carriers, it must provide credits enabling carriers in many instances to escape *any* local taxation based on property located or business conducted in the District. Consider, for example, the carrier having property here that is used to generate telephone charges billable to an address outside the District. Those receipts fall outside the District's telecommunications tax on gross receipts; yet because another state hypothetically might capture them under its similar tax, the District must go further and exempt those receipts from the reach of its personal property or use taxes as well — either that or it must eliminate the exemption relieving locals from paying double taxes (personal property and gross receipts) based on a single transaction. I claim no expertise in commerce clause analysis, but this seems to me unnecessarily formalistic[1] and hard to justify by any generalized fear of balkanization of our nation's tax laws. Before the District must refund the potentially millions of dollars at stake here, it deserves a better explanation than *Tyler Pipe* provides for the invalidity of its tax scheme.

---

[1] The Court has said, after all, that there is nothing unconstitutional about "fair encouragement of in-state business," *Armco, Inc.*, 467 U.S. at 645, of which avoidance of double taxation would seem a prime illustration.

District of Columbia Court of Appeals

No. 92-TX-846

SPRINT COMMUNICATIONS COMPANY, CABLE & WIRELESS COMMUNICATIONS INC., METROMEDIA COMMUNICATIONS CORPORATION NEE CSI NEE ITT, METROCOM NEE TMC, REALCOM OFFICE COMMUNICATIONS, INC. NEE CONTEL, ALLNET COMMUNICATION SERVICES, INC., MID-ATLANTIC TELECOM, INC., LONG DISTANCE SERVICE OF WASHINGTON, INC.,
Appellants,

v.

SHARON PRATT KELLY, SHARON MORROW, & DISTRICT OF COLUMBIA, *et al.*,
Appellees.

TAX 4011-87

[REMAINING PORTION OF CAPTION OMITTED]

On Appeal from the Superior Court of the District of Columbia Tax Division

Before: ROGERS, *Chief Judge*, AND FERREN AND FARRELL, *Associate Judges.*

JUDGMENT

These cases came on to be heard on the transcript of record, the briefs filed, and were argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this Court, that the judgments appealed from are reversed.

Per Curiam
For The Court:

/s/ By: William H. Ng
WILLIAM H. NG
Clerk

DATED: MARCH 15, 1994

Opinion Per Curiam.

Concurring opinion by Associate Judge Michael W. Farrell.

ac

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

TAX NO. 4091-88

CABLE & WIRELESS COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4092-88

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
AT&T COMMUNICATIONS OF D. C., INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4348-89

U. S. SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4349-89

ITT COMMUNICATIONS SERVICES, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4363-90

CONTEL OFFICE COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4650-90

CABLE & WIRELESS COMMUNICATIONS, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 4693-91

ALLNET COMMUNICATION SERVICE, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

TAX NO. 5000-91

LONG DISTANCE OF SERVICE WASHINGTON, INC.
Petitioner

v.

DISTRICT OF COLUMBIA
Respondent

OPINION AND ORDER

Before the Court are cross motions for Summary Judgment. The Petitioners are long distance telephone carriers

asking for judgment declaring the Gross Receipt Tax Amendment Act of 1987 and its accompanying emergency act to be unconstitutional and otherwise invalid and for refund of moneys collected thereunder by the District of Columbia. The Respondent, the District of Columbia asks for affirmance of the Acts and for judgment in its favor.

These cases are the most recent episode in the convoluted tax litigation which has followed AT&T's divestiture of its local operating companies in connection with the antitrust suit *United States v. American Telephone and Telegraph Company*, 552 F.Supp. 131 (D.C.D.C. 1982) aff'd memo 460 US 1001 (1983).

The present issues require a preliminary background review. Prior to the 1984 divestiture a District of Columbia subscriber paid the charge for a long distance call to the Chesapeake and Potomac Telephone Company (C&P) AT&T's wholly owned subsidiary which was the local operating company in the District of Columbia. C & P in turn paid the sum received to AT&T. AT&T computed the share owed to C&P for the part it played in the operation and paid each sum to C&P, a procedure called "the division of revenues." The District of Columbia then taxed C&P on that amount under the gross receipt tax of 1939.[1]

One variety of long distance call constituting a relatively small part of the market, however was not taxed. This concerned calls handled by non affiliated carriers such as Sprint and MCI (called OCC's). These companies paid a charge to C&P for use of its local network in connecting a telephone in the District with an OCC's system. The "access charges" by a Tax Court decision[2] were held not to be within the

---

[1] 53 Stat. 1107 Ch. 1352, Title IV No. 2(a) codified in the 1986 Supp. of the D.C. Code at 47-2501. For a description of the procedures followed see footnote 2, *Barry v. American Telephone & Telegraph Co.*, 563 A.2d 1069 (DC App. 1989).

[2] *C&P Telephone Company v. District of Columbia*, Docket No. 1756, Opinion 1000, July 17, 1962 90 WLR No. 175, Aff'd in part *Chesapeake & Potomac Telephone Co.*, 117 US App.DC 21 (1963)(C&P III).

operative term of the gross receipts tax act of 1939 i.e. ". . . gross receipts for the sale of *public utilities services or commodities* within the District of Columbia." Following the 1984 divestiture, the District of Columbia Court of Appeals in *District of Columbia v. Chesapeake and Potomac Telephone Company*, 516 A.2d 181 (D.C.App. 1986) (called hereafter C&P. IV) not only reaffirmed the prior tax court decision but also held that by virtue of the divestiture AT&T's payments to C&P were now free of liability under the 1939 Act. Accordingly the combination of the divestiture and C&P (IV) deprived the District of Columbia of all the funds which had been obtained under the Gross Receipts Tax from AT&T and C&P's division of revenues. The reaction of the District of Columbia City Council was to pass the "Gross Receipts Tax Amendment Act of 1987" with an accompanying emergency act[3]. The new legislation extended the coverage to gross receipts received from the sale of toll communications services that originate from or terminate on telecommunications equipment located in the District and billed to a District telephone. There was no longer any distinction between AT&T and the former OCC's. Gross receipts in respect of any of them were now taxable. The tax was retroactive to July 1, 1986. The carriers promptly filed suit either as plaintiff or intervenor asking for Preliminary Injunction and Declaratory Judgment (Tax Docket 4011-87; CA 10080-87). Since now there was no question of coverage under the statute the thrust of the carriers attack was that the Act is unconstitutional. The charges were canister-like. The violations alleged were of the Commerce Clause, the Due Process Clause, the Origination of Revenue Bills Clause, the Congressional jurisdiction over the District of Columbia Clause and the Supremacy Clause. Violations of the Home Rule Act were likewise charged. On December 3, 1987, Judge Iraline G. Barnes issued a preliminary injunction halting attempts to collect the tax. Appeal was taken therefrom and on October 6, 1988 the District of Columbia Court of Appeals remanded directing the trial Court to file more detailed

---

[3] 34 DC Reg. 6536 and 5068-5073; DC Code 47-2501(a)(2)(A) (1988 Supp.)

findings of fact or in the alternative to rule on the merits. The Judge preferred the latter course. After a final hearing Judge Barnes found that the Act violated the Due Process Clause in the imposition of a retroactive tax without adequate notice. She further found that the Act violated the Commerce Clause centrally because it was unapportioned and subjected the taxpayer to double taxation. The Court was not impressed by the argument that the City Council lacked the authority to enact tax legislation. Judge Barnes' Order was dated November 14, 1988. It was appealed and on July 19, 1989 the D. C. Court of Appeals rendered its opinion. The appellate court considered itself in something akin to a "catch 22" situation.[4] Since the plaintiffs had not paid the assessed taxes they were not entitled to pursue the suit under the District's "pay before suit" in tax cases statute[5] unless it had been shown beyond debate that the claims of unconstitutionality were valid. Since the Court did not find such to be the case, jurisdiction over the subject matter was considered lacking. The case was remanded with directions to vacate the judgment. In 1989 the 1987 Tax Act was superceded by the *Toll Telecommunications Act of 1989*, (D. C. Act 8-48; D.C. Code Sections 47-3801 through 3821, 2005, 1508 and 2501). This Act inter alia added provisions crediting taxes paid to other jurisdictions on long distance calls and facilitating means of determining data necessary for computing the tax. Measures of this kind had been found by Judge Barnes as necessary but wanting in the 1987 tax. Late in 1988, AT&T paid the tax and filed a new action for refund. (Tax Docket 4092-88). Seven other carriers followed course, (4091-88, 4348-89, 4349-89, 4363-89, 4650-89, 4693-91, 5000-91). In June of 1991, Judge Emmett Sullivan dismissed all of the previous litigation (Tax Docket 4011-87; CA 10080-87) which had been subject to the appellate remand and direction to vacate. Appeal thereto was noted and the District of Columbia Court of Appeals stetted its considera-

---

[4] *Barry v. American Tel.&Tel.*, supra.

[5] DC Code 47-3307, 3303.

tion thereof pending determination of this second clutch of cases. Such posture brings this Court to the pending cross motions for Summary Judgment.

First of all the Court agrees with the parties after a review of the entire record that there is no genuine issue of material fact and that the case depends on resolution of questions of law.

The attack upon the validity of the statute rests on nine claims. These, however, may be found clustered around three major contentions why the carriers should not be required to pay the tax.

The first major contention is that the City Council lacked authority under the Constitution and the Home Rule Act to enact revenue legislation in general and the challenged tax in particular. This is so, plaintiffs argue, because 1) Congress under the Constitution has exclusive legislative jurisdiction over the District and all bills for raising revenue must originate in the House of Representatives; 2) that since long distance calls are interstate the legislation is not "within the district" as required by D.C.Code 1-233 (a)(3); 1-202; and that the statute imposes a tax on the federal government which is specifically prohibited by Article VI, Clause 2 of the Constitution.

The second major claim is that the tax fails to apportion gross revenues from interstate commerce between the several jurisdictions and discriminates against out of state competitors violating both the Commerce and the due process clauses.

The third claim is that the retroactive features of the Act violate the due process clause.

The arguments have been carefully crafted and earnestly pressed but this Court is not persuaded by them.

I

The City Council with approval of the Mayor has the authority to enact proper revenue legislation for the District

of Columbia in general and had the authority to enact the Gross Receipt Tax Amendment of 1987 and the Toll Telecommunications Act of 1989 in particular.

It is manifest that by the Self Government Act of 1973, D.C. Code 1-204 et seq. (called popularly and in this opinion, the Home Rule Act), the delegation of powers was virtually plenary. "The legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of the Act subject to all the restrictions and limitations imposed upon the States by the !0th Section of the first article of the Constitution of the United States." (D.C. Code 1-204).

The limitations on the powers were specifically set forth. As far as the power to tax was concerned, the prohibited areas were the commuter tax and functions or property of the Federal Government (D.C. Code 1-233(A)(3) and (a).

Congressional oversight was provided by requiring the legislation to be laid before the Congress for a period of thirty (30) days prior to its effective date.

There was no question about the intent of Congress in enacting the statute. In the course of debates Senator Thomas Eagleton, chairman of the Senate District Committee and manager of the bill explained:

> "We will find in the bill the right of the City Council and the Mayor to enact into law ordinances relating to taxation, excluding at least two very important things that they cannot act upon: The taxation, of course, of any Federal property is prohibited by the constitution, and we prohibit them from the imposition of an income tax on nonresidents of the District of Columbia. But with those two exceptions, one constitutional and one that we impose statutorily, the City Council and an elected Mayors [sic], elected by the three-quarters of a million people of the city, can decide in what way and how much to tax their citizens, can enact local ordinances into law, and can

begin to shape their own destiny as should be the right of all American citizens."[6]

The D. C. Court of Appeals has endorsed the legislative scheme by sharply preventing any attempt by the Council to intrude into specifically forbidden areas *Bishop* v. *District of Columbia*, 411 A.2d 997 en banc, cert.den. 446 U.S. 966 (1980) while endorsing the broad grant of power and refusing to adopt any restrictive view of the delegation. *District of Columbia* v. *Greater Washington Labor Council*, 442 A.2d 110, cert.den. 460 U.S. 1016.

The argument of the carriers in these premises is that regardless of its intention the Congress was prohibited from delegating the taxing power to the City Council by a combination of the Constitution's Article I, Section 8, Clause 17 which gives the Congress exclusive power to legislate over the District of Columbia and Article I, Section 7, Clause I which provides that revenue measures originate in the House of Representatives. This latter measure followed the seventeenth century British tradition[7] or perhaps one of even earlier orgin that money bills must originate in the House of Commons and not in the House of Lords or the Crown.

The levy of moneys for the crown without the grant of parliament had been a matter of serious contest between the Stuart Kings and the Parliament and was condemned by the Bill of Rights of 1689. Toward the end of that century the House of Commons rejected any attempt by the the House of Lords to assume the power of initiating money bills. The complete means of enforcing this prerogative has always been with the lower house itself simply by refusing to pass the offending upper house bill.[8] No case has been cited suggesting

---

[6] 119 Cong.Rec. 22947 (1973).

[7] *Commons, House of*, Vol. 3, New Encyclopedia Britannica, Micropedia p. 494.

[8] For the House of Representatives see 99 Cong.Rec. 1897-98 (March 12, 1953) where the house voted to refuse and return a senate bill making appropriation. For the House of Parliament see the much earlier incident reported by Macaulay in History of England, Book IV, Chapter XIX. "The

[Footnote continued on next page]

that the prerogative of the House of Commons or Representatives had the purpose of preventing the legislatures from delegating local or parochial taxing powers to subordinate institutions. The concept has never prevented such delegations as far as the District[9] or for the territories,[10] where the same considerations apply, are concerned. The lack of au-

---

[Footnote continued from the previous page]
land-tax was not imposed without a quarrel between the Houses. The Commons appointed commissioners to make the assessment. These commissioners were the principal gentlemen of every county, and were named in the bill. The Lords thought this arrangement inconsistent with the dignity of the peerage. They therefore inserted a clause providing that their estates should be valued by twenty of their own order. The Lower House indignantly rejected this amendment, and demanded an instant conference. After some delay, which increased the ill-humor of the Commons, the conference took place. The bill was returned to the Peers with a very concise and haughty intimation that they must not presume to alter laws relating to money."

[9] Congress, in incorporating the City of Washington in 1802, gave the municipal corporation "full power and authority to pass all by-laws and ordinances," and the power "to lay and collect taxes." *Act of May 3, 1802 Incorporating the City of Washington*, Section 7, 2 Stat. 195. Ten years later, Congress gave additional power to the city government, "to lay taxes on particular wards, parts or sections of the city, for their particular local improvements." *Act of May 4, 1812 Amending the Charter of Washington*, Section 5, 2 Stat. 721. Shortly thereafter, Congress gave authority to the Levy Court for Washington County for certain enumerated purposes "and all other general county purposes, annually [to] lay a tax on all the real and personal property in the said county." *Act of July 1, 1812 Relative to Levy Court of Washington County*, Section 8, 2 Stat. 771. In later reorganizations of the city and county governments in the District of Columbia, Congress delegated authority to enact tax measures. *See Act of May 15, 1820 Reorganizing the Government of the City of Washington*, Sections 7, 8, 13, 2 Stat. 853 (reprinted D.C. Code Section 1-70 (1981)); *Act of May 14, 1848 Reorganizing the Government of the City of Washington*, Sections 2, 3, 9, 11, 9 Stat. 233 (reprinted at D.C. Code Section 1-70 (1981)); *Act of March 3, 1863 to Define the Powers and Duties of the Levy Court of Washington County*, Sections 3, 4, 12 Stat. 799 (reprinted at D.C. Code Section 1-83 83 (1981)); *Act of February 21, 1871 To Provide a Government for the District of Columbia*, Sections 14, 18, 20, 21, 22, 23, 29, 37, 16 Stat. 419 (reprinted at D.C. Code Section 1-92 (1981)).

[10] Territorial Organic Acts of: *Louisiana*, Section 4 (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* Section 6 (April 12, 1863, 5 Stat. 10, 12-13, *Iowa* Section 6 (June 12 1838, 5 Stat. 235, 237); *Oregon* Section 6 (Aug. 14, 48, 9 Stat. 323, 324); *Minnesota* Section 6 (March 3, 1849, 9 Stat. 4-3.
[Footnote continued on next page]

thority for the argument does not persuade this Court to follow it.

The next argument is that the delegation of taxing power is prevented by Article VI, Clause 2 which provides that a state may not, consistent with the Supremacy Clause, lay a tax directly on the United States and by Section 23(a)(3) of the Home Rule Act which prohibits any act which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District. The argument arises generally out of statements in the record that if the District passed a sales tax as have many of the states enacting telecommunications laws it would find that about half of the intended taxpayers were exempt i.e. the Federal Government, the District Government, Foreign Embassies and chanceries and a number of charitable and educational foundations — hence the need for a gross receipts tax. The carriers adroitly counter by charging that pass-through provisions in reality then mean that the tax is sought to be imposed on the United States as prohibited by the Constitution and the federal function provision of the Home Rule Act. The law however is that the Constitution permits a State to tax the gross receipts of those who do business with the United States, *James v. Dravco Contracting Co.*, 302 U.S. 134, 149, 160, (1937); *Silas Mason* v. *Washington Tax Commission*, 302 U.S. 186, 190, 210, (1937) even if the total reciepts of a contractor are from the United States and the tax will be borne by the Government,

---

[Footnote continued from the previous page]
405); *New Mexico* Section 7 (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* Section 6 (Sept. 9 1850, 9 Stat. 453, 454-55); *Washington* Section 6 (March 2, 1853, 10 Stat. 172, 175); *Nebraska and Kansas* Section 6 (May 30, 1854, 10 Stat. 277, 279); *Colorado* Section 6 (Feb. 28, 1861, 12 Stat. 172, 174); *Nevada* Section 6 (March 2, 1861, 12 Stat. 209 211); *Dakota* Section 6 (March 2, 1861, 12 Stat. 239, 241); *Arizona* Section 2 (same powers as New Mexico Territory) (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* Section 6 (March 3, 1863, 12 Stat. 808, 810); *Montana* Section 6 (May 26, 1864; Section 13 Stat. 85, 88); *Wyoming* Section 6 (July 25, 1868 Section 6 (May 26, 1864, 13 Stat. 85, 88); *Wyoming* Section 6 (July 25, 1868, 15 Stat. 178, 180); *Oklahoma* Section 6 (May 2, 1890, 26 Stat. 81, 84); *Virgin Islands*, 48 U.S.C. Section 1574(a).

United States, v. *New Mexico*, 455 U.S. 720, 735, 741, (1982). See also, *California State Board of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, (1989).

Next comes the carriers' claim that the tax legislation is illegal because long distance calls are interstate and the District of Columbia may not "enact any act . . . which is not restricted in its application exclusively in or to the District," D.C. Code 1-233 (a)(3); 1-202. This is too cramped a reading of the Home Rule Act. The Act was intended to delegate to the District the same character of legislative power as that held by a state except where specifically prohibited. And, the legislative history clearly indicates that the "Congress intended in 1-233(a)(3) to withhold from local officials the authority to affect decisions made by federal officials in administrating federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia" *The District of Columbia* v. *Greater Washington Labor Council*, supra. at 116. The limitation of legislation to District purposes cannot be held to prevent the District from enacting the same kind of law as the Illinois statute approved in *Goldberg* v. *Sweet, Direct of Illinois Revenue, et al.*, 488 U.S. 252 (Jan. 10, 1989).

II

The legislation presents no undue burden upon interstate commerce and is not unconstitutional.

The second issue concerns the charges of the carriers that the legislation violated the due process and commerce clauses of the Constitution. The contention was persuasive to Judge Iraline Barnes in Tax Docket 4011-87. The Judge now sitting has the highest respect for his former colleague but notes that two events, occurring well after Judge Barnes' Opinion and Order were docketed, have significantly altered affairs. The first of these is the decision of the United States Supreme Court in *Goldberg* v. *Sweet, Director, Illinois Department of Revenue, et. al.*, supra.; second, the enactment of the Toll Telecomunications Act of 1989 adding two provisions which Judge Barnes had found fatally wanting in the 1987 Act.

Goldberg affirmed the Illinois Excise Tax Act imposing a tax on gross charges of interstate telecommunications which originated or terminated in the state and were charged to an Illinois service address. The case was not simply an addition to the "tangled underbrush" [11] of commerce clause decisions. It was instead an opinion of sharp insight and great clarity. The Court saw that prior decisions in the telecommunications field had been based upon the perception that long distance systems operated through a complex of wires and switchboards bearing a ready analogy for tax purposes to railroad lines and bus routes, whereas modern communication technology actually operated through a complex of satellites, fiber optics, microwave radios, electronic impulses and computerized networks having little if any relationship to older techniques[12].

With this fresh perspective the Supreme Court measured the Illinois statute by the four pronged test it had established in *Complete Auto Transit, Inc.* v. *Brady*, 430 US 274 (1977). Such a procedure is obviously the one to be followed here.

Under *Complete Auto* a state tax will withstand Commerce Clause scrutiny if

> . . . the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to services provided by the state.[13]

Since there is no question about the nexus of the District of Columbia the initial measure is in respect of the second prong, fair apportionment. Apportionment is determined by examining whether a tax is internally and externally consistent.[14] This Court concludes that the D. C. Tax statutes

---

[11] *Northwestern State Portland Cement* v. *Minnesota*, 358 US 450, 457 (1987).

[12] *Goldberg* 488 US 254, 255.

[13] *Complete Auto*, 488 US 279.

[14] *Goldberg*, 488 US 261.

of 1987 and 1989 are internally consistent " . . . for if every state taxed only those interstate calls which only charged to an in state service address only one state would tax each interstate call".[15]

"The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in state component of the activity being taxed"[16]

Goldberg then notes that, "we doubt that states through which the calls electronic signals merely pass have a sufficient nexus to tax that call" and "we also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a state to tax a call."[17]

The Court added, "We recognize that if the service address and billing location of a taxpayer are in different States some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." "To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation.[18]"

To the present Court the combination of the *Goldberg* opinion and the credit provision of the 1989 Act have destroyed the charge that there is a failure fairly to apportion the tax.

The carriers claim that the Gross Receipts Tax does not withstand scrutiny under the third prong of the *Complete Auto* test. They argue that the Act is fatally discriminatory because it allows for a credit and/or exemption from the District's personal property, sales and use taxes to the extent that property subject to such taxes is used to generate the gross receipts which are subject to tax.

---

[15] *Goldberg*, 488 US 261.

[16] *Goldberg*, 488 US 261.

[17] *Goldberg*, 488 US 263.

[18] *Goldberg*, p. 264.

The fault of the argument is that discrimination found to be invidious under the Commerce Clause is that between interstate and intrastate commerce. The third prong of *Complete Auto* exists to ensure that a tax "does not discriminate against interstate commerce." *Complete Auto Transit* v. *Brady*, supra. at 279. "Traditionally applied, the discrimination doctrine demands substantially equal treatment of interstate and intrastate business under the tax laws of a given state." *Shores: State Taxation of Gross Receipts and the Negative Commerce Clause.* 54 Missouri Law Review 555 (1989). The 1987 Act at issue does not discriminate at all between intradistrict and interstate carriers. In fact, the Act is only applicable to interstate carriers. The Act's personal property credit/exemption provision is available to any long distance carrier, regardless of whether it is an intradistrict or an out-of-state company, insofar as it owns property in the District which is used to generate gross receipts.

Neither is the nature of the matter changed by referring to the Manufacturing/Wholesaling Acts of West Virginia and Washington treated in *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984) and *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 483 U.S. 232 (1987). In these cases, companies manufacturing and selling within state were taxed at a lower rate than those companies manufacturing instate and selling out-of-state or manufacturing out-of-state and selling instate. The statutes involved were facially and practically discriminatory statutes paralyzing interstate commerce and favoring local transactions. The 1987 Gross Receipts Act is facially neutral. *Every* long distance carrier owning property in the District of Columbia is subject to a personal property tax imposed by the District and *every* long distance carrier is entitled to a credit/exemption to the extent that his personal property is used to produce gross receipts. Those companies who do not own property in the District are not only unable to avail themselves of the personal property exemption/credit, but they are also free from all personal property taxes in the District of Columbia. All of the Petitioners except Long Distance Services of Wash-

ington Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund. "Such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business." *Armco, Inc.* v. *Hardesty*, supra. at 645. This credit has been preserved on the taxes against the telephone companies from the original Gross Earnings Tax of 1902 through the Toll Telecommunication Act of 1989.

Finally, the fourth and last prong of the *Complete Auto* test is whether the tax is fairly related to services provided by the taxing state. "Beyond the threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of State tax burden." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1939). The District of Columbia provides many municipal services which are accessible to the long distance companies. Telephone company employees drive to and from work on the District's roads, the water system is available for their use, and in the event of an emergency, the District's police and fire squadrons stand ready to come to their aid. The carriers are able to avail themselves of all the amenities that the nation's capitol has to offer and the gross receipts tax represents their "just share" of the tax burden.

III

The retroactive features of the tax statutes are constitutionally permissible and are valid. The feature complained of by the companies in this respect is that the act at issue was passed July 17, 1987 with its emergency act effective that date and the permanent act effective October 1, 1987, both retroactive to July 1, 1986.

Retroactivity in legislation often renders it constitutionally suspect. However, tax statutes are a separate and distinct

category. For example, Valid Retroactive Income Tax laws (as distinguished from gift taxes) are more often the rule than the exception and though the claim of " 'arbitrary retroactivity' may continue . . . to rear its head in tax briefs but for practical purposes, in this field, it is as dead as wager of law."[19] Both sides in this case have advised that the law in this area has best been expressed by the opinion of Mr. Justice Stone in *Welch* v. *Henry*, 305 U.S. 134 (1938), though they differently interpret it.

One of the crucial passages of *Weich* recites as follows:

> The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U.S. 15, 21; and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.
>
> In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. *Nichols* v. *Collidge*, 274 U.S. 531, 542; *Untermeyer* v. *Anderson*, 276 U.S. 440, 445 (citing *Blodgett* v. *Holden*, 275 U.S. 142, 147); *Coolidge* v. *Long*, 282 U.S. 582. Since, in each of these cases, the donor might freely have chosen to

[19] Ballard: Retroactive Tax Legislation, 48 Harvard Law Review 592 (1935); See also, Hochman: The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard Law Review 692, 706 (1960).

> give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy. *Milliken* v. *United States*, supra. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

In analyzing the 1987 tax to determine whether it is unconstitutionally "harsh and oppressive" it must be noted that the District had a compelling reason to act. A loss in tax revenue of 23.6 million dollars had developed between the divestiture of January, 1984 and July of 1986 which other taxpayers had to bear.[20] It does not appear to this Court so unreasonable or oppressive when the Emergency Act accompanying the 1987 Tax Act became effective as of July, 1987 to apportion the burden for the preceding tax year to the Carriers. The interval was no longer than the tax approved in *Welch* and in many of the cases collected by Mssrs. Ballard and Hochman in their articles cited supra.

The Petitioners here argue that they are entitled to the same tests as were the gift taxpayers mentioned in *Welch*, i.e. to notice of the impending tax and sufficient time to take measures to avoid it. This Court holds that the true test for the Petitioners is the Income Tax Test i.e. whether the tax is unconstitutionally harsh and oppressive. Assuming arguendo, however that the Gift Tax test is applicable the carriers position is not improved. Circumstances can provide

---

[20] The District had to refund 14.7 million dollars from gross receipts collections from the period January 1984 through June 1985 and 8.9 million uncollected from July 1985 through June 1986. Report of Committee on Finance and Revenue on Bill 7-186, Gross Receipts Tax Amendment Act of 1987 at 8. D.C. Exhibit #15 at 920.

notice, *United States* v. *Darusmont*, 449 U.S. 292 (1981). The carriers have either been parties to or have been significantly affected by an avalanche of litigation related to the revolution in the telecommunications industry.[21]

Armed with this litigation experience it was certainly reasonable for the industry to foresee as did Judge Nebeker in C&P IV that a new tax to halt the substantive loss of revenue was inevitable.[22] Also with the failure of the tax on the local operating company (C&P) and the predisposition of the District to the Gross Receipts Tax it was certainly foreseeable that such a tax would be levied on the Long Distance Carriers covering as great a time interval as would legally be possible. The claim that if they had only known of the pendency of the tax the carriers would have closed their business in the District or would have exercised some undetailed organizational manuever to avoid the tax is not attractive. An examination of the size of the carriers' gross receipts in the Kerwin Affadavit[23] and the words of *Welch* (p. 148) "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would be subject to a new tax or an increase in an old one." provide answer to this claim.

---

[21] e.g. The drive by the OCC's to enter the market. (*Bell System Tariff Offering of Local Distribution Facilities for Use by other Common Carriers*, 46 FCC2d 413 aff'd sub nom *Bell Telephone Co.* v. *FCC*, 503 F2d 1250 (1974) cert. den. 422 U.S. 1026; *MCI Telecommunications v.* FCC 180, 188 U.S.App.D.C. 327, 580 F.2d 590, cert. den. 439 U.S. 980 (1978)); the break up of the Bell System (*United States* v. *AT&T*, supra) and the tax cases governing the industry (C&P III and C&P IV, supra, *Chesapeake and Potomac Telephone Co.* v. *District of Columbia*, 78 U.S.App.D.C. 53, 137 F.2d 674 (1943) called here C&P I and *Chesapeake and Potomac Telephone Co.* v. *District of Columbia*, 86 U.S.App.D.C. 124, 179 F.2d 814 (1950) called here C&P II.

[22] "We hasten to note however that the significant structure changes in the telephone industry resulting from the divestiture of AT&T (citing cases) render the tax consequences of those changes appropriate for legislative consideration." C&P IV at p. 82.

[23] Affadavit of supervising auditor Kerwin attached to the motion of the District of Columbia for Summary Judgment.

The final and most subtle argument in this set is that principles of public utility law prohibiting retroactive rates or surcharges render the retroactive portion of the tax between the dates new tariffs might have been filed and July 1, 1986 to be invalid.

The authorities do indeed support the proposition that a public utility may not set rates to recoup past losses nor may a carrier recover from its ratepayers past deficiencies in rates citing *Nader* v. *FCC*, 172 U.S. App. D.C. 1, 20, 520 F.2d 182, 202 (1975, citing *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388 (1922), *Washington Gas Light Co.* v. *Baker*, 88 U.S. App. D.C. 115, 188 F.2d 11 (1950), *Williams* v. *WMATC* 134 U.S. App. D.C. 342, 415 F.2d 922 *cert. den.* 393 U.S. 1081 (1969). Taxes however are not a loss. They are ". . . neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government. . . ." *Welch* at p. 146. They are instead operating costs and "there is no difference in this respect between state and federal taxes or betwen incomes taxes and others." *Galvestion Electric Co.* v. *Galveston*, *supra* at 399. All parties here seem to agree that the "pass-through" method is not feasible but they differ upon the suitability of the raising of rates. The answer to this is that before the present court is the question of the validity of a tax and not the solution to a rate case. The correct fora to determine the latter are the Federal Communications Commission and the United States Court of Appeals for the District of Columbia Circuit.[24] Retroactive rates have certainly been disallowed in many circumstances but not always. *Bell Telephone Company of Pennsylvania* v. *Federal Communications Commission, et al.*, 245 U.S.App.DC 386, 761, 789 F.2d (See the number of occasions when amortization has been approved for regulatory expenses, obsolete property, acquisition adjustments, inflation, and acceleration of income tax depreciation.)[25] There has been here no reference to any attempt by

---

[24] Communication Act of 1934, 47 U.S.C.A. #204, 204.

[25] 1 Priest, Principles of Public Utility Regulation Ch. 3 "Elements of Rate Making."

the petitioners to seek an adjustment by the FCC of the tax difficulties created by the break-up of the Bell System and this Court will not presume that such is impossible. The Court's task is to determine the validity of the 1987 tax and it holds the Act constitutional and valid.

IV.

Conclusion

Any other points raised by the Plaintiffs the Court considers peripheral to matters decided above and if not they are considered and found unpersuasive.

For the reasons as aforesaid the Court finds that the Respondent the District of Columbia is entitled to grant of its Cross-Motion for Summary Judgment and further finds that the Petitioners' motions for Summary Judgment must be denied.

ORDER

The Court having before it the cross motions for Summary Judgment of the above captioned parties and having found that there exists in the premises no genuine issue of material fact and that the Respondent, the District of Columbia, is entitled to judgment as a matter of law, now therefore the cross motions of the Respondent for Summary Judgment is hereby GRANTED and the motions of Petitioners and each of them for Summary Judgment are hereby DENIED, and it is this 18th day of February 1992

ORDERED that the Respondent, District of Columbia is hereby granted Judgment of Dismissal on the Merits as to each and every petition filed herein, and the aforesaid petitions are dismissed with prejudice.

/s/ By: John F. Doyle

JOHN F. DOYLE,
Senior Judge

cc: William Malone, Esquire
Miller & Holbrooke
1225 - 19th Street, NW, Suite 400
Washington, DC 20036
Attorney for U S Spring, Cable & Wireless and Metromedia Communications nee CSI nee ITT

John M. Wood, Esquire
Reed Smith Shaw & McClay
1200 - 18th Street, NW
Washington, DC 20036
Counsel for AT&T

Joseph A. Rieser, Jr., Esquire
Reed Smith Shaw & McClay
1200 - 18th Street, NW
Washington, DC 20036
Counsel for AT&T

Paul M. Tendler, Esquire
Tendler & Biggins
12th Floor
1090 Vermont Avenue, NW
Washington, DC 20005
Counsel for Metrocom nee TMC

Mitchell F. Brecher, Esquire
Dow, Lohnes & Albertson
1255 - 23rd Street, NW, Suite 500
Washington, DC 20037
Counsel for ALLNET

Russell M. Blau, Esquire
Swidler & Berlin
3000 K Street, NW, Suite 300
Washington, DC 20007-3841
Counsel for Mid-Atlantic and LDS of Washington

Eric F. Facer, Esquire
Zuckerman, Spaeder, Goldstein,
Taylor and Kolker
1201 Connecticut Avenue, NW
Washington, DC 20036
Counsel for CONTEL nee Realcom

Charles R. Wunsch, Esquire
United Telecommunications, Inc.
KSWESALK
Westwood, Kansas 66205

John Payton, Esquire
Corporation Counsel, D. C.

Julia L. Sayles, Esquire
Assistant Corporation Counsel, D. C.
Chief, Finance Section
Community Development Division
51 N Street, NE, Room 310
Washington, DC 20002

Arlene L. Robinson, Esquire
Acting Deputy Corporation Counsel, D. C.
Community Development Division

Edward E. Schwab, Esquire
Assistant Corporation Counsel, D. C.
Appellate Division

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1482

MARION S. BARRY, JR., *et al.*, APPELLANTS,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY and AT & T COMMUNICATIONS OF WASHINGTON, D.C., INC., APPELLEES,

and

No. 88-1483

DISTRICT OF COLUMBIA, *et al.*, APPELLANTS,

v.

U S SPRINT COMMUNICATIONS COMPANY, *et al.*, APPELLEES,

and

No. 88-1535

AMERICAN TELEPHONE & TELEGRAPH COMPANY and AT & T COMMUNICATIONS OF WASHINGTON, D.C., INC., CROSS-APPELLANTS,

v.

MARION S. BARRY, JR., *et al.*, CROSS-APPELLEES,

and

[1517-A]

No. 88-1537

U S SPRINT COMMUNICATIONS COMPANY, *et al.*,
CROSS-APPELLANTS,

v.

MARION S. BARRY, JR., *et al.*, CROSS-APPELLEES.

Appeals from the Superior Court of the
District of Columbia

(Hon. Iraline Green Barnes, Trial Judge)

(Argued March 29, 1989 Decided July 18, 1989)*

Edward S. Schwab, Assistant Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellants/cross-appellees.

Julia L. Sayles, Assistant Corporation Counsel, and *Pastell Vann*, Assistant Corporation Counsel, entered appearances for appellants/cross-appellees.

John M. Wood, with whom *Joseph A. Reiser, Jr.*, was on the brief for appellees/cross-appellants American Telephone & Telegraph Company and AT & T Communications of Washington, D.C., Inc.

William Malone, with whom *John F. Noble*, was on the brief, for appellees/cross-appellants U S Sprint Communications Company Ltd. Partnership, ITT Communications Services, Inc., and Cable and Wireless Communications, Inc.

---

* The decision in this case was released this date.

Paul M. Tendler entered an appearance for appellee/cross-appellant TMC Long Distance of Washington Incorporated.

Mitchell F. Brecher entered an appearance for appellee/cross-appellant Allnet Communications Services, Inc.

Andrew D. Lipman and *Russell M. Blau* entered appearances for appellees/cross-appellants Mid Atlantic Telecom, Inc., Long Distance Service of Washington, Inc., and Contel Office Communications, Inc.

Craig T. Smith and *Patrick E. McMahon* entered appearances as of counsel for appellee/cross-appellant U S Sprint Communications Company.

Sandra K. Kincaid entered an appearance as of counsel for appellee/cross-appellant ITT Communications & Information Services, Inc.

Before MACK, NEWMAN and BELSON, *Associate Judges.*

NEWMAN, *Associate Judge*: The District of Columbia, *et al.* (the District) appeal a declaratory judgment entered by the Tax Division of the Superior Court that the Gross Receipts Tax Amendment Act of 1987 and its companion bill, the Gross Receipts Tax Amendment Emergency Act of 1987, which impose a retroactive and prospective tax on the sale of telecommunications services originating from or terminating on equipment located in the District of Columbia, are unconstitutional.[1] On cross-

[1] While these appeals were pending, the Council for the District of Columbia enacted new telephone tax legislation in response to the adverse ruling below and the Supreme Court decision in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989), a case upholding the constitutionality of an Illinois excise tax on interstate telecommunications. 36 D.C. Reg. 1911-20 (1989);

appeal, American Telephone & Telegraph Co. and U S Sprint Communications Company, *et al.* (collectively referred to as the Carriers) request that the decision below be affirmed insofar as it holds the Acts unconstitutional and reversed insofar as it rejects their claims that the Acts are unconstitutional on other grounds. Although the constitutional issues may be inviting, we are barred from reaching them under our so-called anti-injunction statute, which provides that "[n]o suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax." D.C. Code § 47-3307 (1987). Therefore we reverse and remand with instructions to vacate the trial court's declaration of unconstitutionality.

I.

This litigation indirectly springs from the divesture of American Telephone and Telegraph Co. (AT & T) in January 1984. The new relationships which evolved among the telecommunications companies operating in the District of Columbia following the divestiture changed significantly the implications and application of the District's gross receipts tax scheme, including a substantial reduction in taxable revenues. The District's attempt to adjust to the post-divestment realities of the telecommunications

---

see Toll Telecommunications Service Tax Emergency Act of 1989, D.C. Act 8-2, 36 D.C. Reg. 1892-1903 (1989) (emergency legislation effective March 1, 1989, for a period of ninety-days) ; Toll Telecommunication Service Tax Temporary Act of 1989, Act 8-14, 36 D.C. Reg. 2375-2386 (1989) (temporary legislation that will take effect after completion of the thirty-day congressional review period and remain in effect for 225 days, during which time the Council will consider permanent legislation).

business by amending the then existing tax laws gave rise to the instant suit.[2]

---

[2] Prior to the divestiture, Chesapeake and Potomac Telephone Company (C & P), a wholly owned local subsidiary of AT & T, was the sole provider of both local and long-distance telephone service in the District of Columbia. C & P provided long distance service to its customers through a "payment-for-payment" arrangement with AT & T and other affiliated local telephone companies. Under this arrangement, C & P collected the long-distance charges from its customers and passed the revenues on to AT & T. In turn, C & P received a share of the total long-distance revenues collected by AT & T from all of its subsidiaries. The "division of revenues" which C & P received from AT & T was subject to the District of Columbia's gross receipts tax under D.C. Code § 47-2501 (1981 & Supp. 1988), as payments derived from the sale of public utility services within the District of Columbia. *See Chesapeake & Potomac Tel. Co. v. District of Columbia*, 78 U.S. App. D.C. 53, 54, 137 F.2d 674, 674-75 (1943) (allowing taxation of C & P because it was receiving revenue for public utility services which it rendered for the public).

At the same time, C & P also had arrangements with unaffiliated long-distance telecommuniations carriers (OCC's) for their use of C & P's network access services and local facilities. Under this arrangement, C & P played no part in servicing or billing the OCC's customers. In return for the use of network access services and local facilities, C & P received "access payments" from the OCC's. Unlike the division of revenues C & P received from AT & T, these access payments were exempt from the gross receipts tax because the charges were not derived from the sale of public utility services within the District of Columbia. *See Chesapeake & Potomac Tel. Co. v. District of Columbia*, 117 U.S. App. D.C. 21, 26, 325 F.2d 217, 222 (1963) ("when a public service company supplies services or facilities to another public utility company in the same field for the sole purpose of enabling the latter company to serve its customers more efficiently, such services are not 'public utility commodities

Hoping to recapture the revenues lost by the changes attendant to the divestiture, on July 17, 1987, the Council of the District of Columbia enacted the Gross Receipts Tax Amendment Act of 1987 (Act).[3] 34 D.C. Reg. 5068-73 (1987). Pursuant to the Council's emergency powers, they also passed the Gross Receipts Tax Amendment Emergency Act of 1987, making the provisions of the Act effective as of July 17, 1987, for a period of ninety days, and expiring on October 1, 1987. 34 D.C. Reg. 5275-80 (1987). The Emergency Act made the tax retroactive to July 1, 1986, without any payment being due before October 30, 1987.[4]

---

or services,' within the meaning of our statute, and thus are not subject to the gross receipt tax.").

The divestiture ended the payment-for-payment arrangement between C & P and AT & T. Accordingly, in January 1984, C & P began treating payments received from AT & T for the use of its network access services and local facilities as access payments, and excluded those payments from its gross receipts. This tax treatment was eventually upheld in *District of Columbia v. Chesapeake & Potomac Tel. Co.*, 516 A.2d 181, 184 (D.C. 1986).

[3] The District estimated that as of 1986, the exclusion of access charges mandated by this court's decision in *Chesapeake & Potomac Tel. Co., supra,* 516 A.2d 181, resulted in a revenue loss of approximately $23.6 million. Under the Act, the District expected to recoup about $20 million from the retroactive portion of the tax and approximately $18.5 million per year thereafter. *See* D.C. Council Committee on Finance and Revenue, Report on Bill 7-186, "Gross Receipts Tax Amendment Act of 1987," at 7-8 (1987).

[4] The purpose of the emergency legislation was to allocate certain revenues to a prior fiscal year and to provide the Department of Revenue authority and substantial lead time to adopt rules governing collections of revenue under the Act. 34 D.C. Reg. 5275 (1987).

The "permanent" Act became effective on October 1, 1987. The Act amended D.C. Code § 47-2501 (1981) to require telecommunications companies previously exempt from the gross receipts tax to pay a 6.7% tax on the

> monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received.

D.C. Law 7-25, § 2, 34 D.C. Reg. 5068 (1987), codified at D.C. Code § 47-2501 (b) (Supp. 1988). The tax is self-executing, that is, every month the companies must file an affidavit with the Mayor setting forth the amount of monthly gross receipts on which payment of the tax is made. D.C. Code § 47-2501 (b) (1) (A) (Supp. 1988). The legislation also created exemptions from the District's personal property, sales and use taxes where the company is also subject to the gross receipts tax, as well as a credit against the gross receipts tax for personal property tax paid to the District during the period of retroactivity, July 1, 1986 through September 30, 1987. D.C. Code §§ 47-2501 (b) (3) (B), (C), -2005 (5) & -2206 (Supp. 1988).

On October 7, 1987, U S Sprint Communications Company, *et al.*, filed an action in the civil division of Superior Court seeking a preliminary injunction, *pendente lite*, to enjoin the District from collecting all taxes under the Act.[5]

---

[5] U S Sprint Communications Company (U S Sprint), TMC Long Distance of Washington Incorporated (TMC)

While this action was pending, payments on the prospective and retroactive portions of the tax became due on October 20, 1987 and November 1, 1987, respectively. On or about November 16, 1987, the Department of Revenue issued notices of deficiency assessments to U S Sprint, Allnet, Mid Atlantic, RealCom, Long Distance and Starnet, for failure to pay the tax.[6] The notices informed the companies that enforcement measures to collect the tax would be taken if payments were not received by November 25, 1987. Thereupon U S Sprint, *et al.*, filed an amended complaint and an amended motion for a preliminary injunction. With respect to the complaint, the parties withdrew the prayer for a permanent injunction and instead requested declaratory relief.

On November 24, 1987, American Telephone & Telegraph Company and AT & T Communications of Washington, D.C., filed a motion to stay that was almost identical to the motion for preliminary injunction filed by U S Sprint, *et al.* The following day, the two actions were consolidated and transferred to the Tax Division, where the court orally granted a temporary restraining order on the collection of taxes, but withheld a written order pending a hearing on the merits. After oral argument, on December 3, 1987, Judge Barnes granted the Carriers' motion for a preliminary injunction notwith-

---

and Starnet International, Inc. (Starnet) were the original plaintiffs in Civil Action No. 8599-87. Allnet Communication Services, Inc. (Allnet), Cable and Wireless Communications, Inc. (Cable & Wireless), Mid Atlantic Telecommunications, Inc. (Mid Atlantic), Long Distance Service of Washington, Inc. (Long Distance) and RealCom Communications Corp. (RealCom) were permitted to intervene as party plaintiffs on November 10, 1987.

[6] Apparently some of the Carriers filed the requisite affidavits, but none paid the tax prior to commencing this suit.

standing the anti-injunction statute. The court found that equitable relief was warranted in light of the circumstances attendant to the imposition, retroactively, of a new tax enacted as emergency legislation.

This court granted the District's request for an expedited interlocutory appeal on the grant of the preliminary injunction motion and in an Order dated October 6, 1988, we remanded the case after concluding that "the record does not provide a sufficient basis for us to determine the correctness of the trial court's decision." We therefore directed the trial court to make more detailed findings of fact and conclusions of law, or in the alternative, to rule on the merits.[7]

Meanwhile, hearings on the merits had been held and on November 11, 1988, the trial court granted a declaratory judgment. The court concluded that the Act's retroactive and prospective provisions violate the Due Process Clause because of the overly burdensome costs of compliance; that the Act violates the Commerce Clause because it imposes a tax that is unfairly apportioned and not fairly related to the services provided in the District, and that application of the Act's provisions results in double taxation. The District contends that the declaratory judgment should be reversed. The court also found

---

[7] In our Order for Remand we asked, *inter alia*:

> What is the factual and legal basis for the trial court's conclusion that this case presents exceptional and extraordinary circumstances so as to warrant injunctive relief, notwithstanding D.C. Code § 47-3307 (1987)? *See District of Columbia v. Green*, 310 A.2d 848 (D.C. 1973); *see also Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974) (injunction may issue only "if it is clear that under no circumstances could the Government ultimately prevail") (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

that the Act's tax exemption/credit provisions do not violate the Commerce Clause by discriminating in favor of local business; that Congress' delegation of legislative power to tax is fully consistent with the Origination Clause, and that the Act does not "concern the functions or property of the United States" in violation of D.C. Code § 1-233 (a) (3) (1987). On cross-appeal, the Carriers urge reversal of these findings.[8]

II.

The District argues that D.C. Code § 47-3307 (1987) deprives this court of subject matter jurisdiction because it bars any suit that is filed to enjoin the assessment or collection of a tax by the District of Columbia. Simply put, the District claims that the Carriers, like all other taxpayers, should be required to abide by the "pay first and litigate later" rule, that is, as a condition precedent to challenging the assessment in court, a party must pay the tax. D.C. Code § 47-3307 (1987); *see* D.C. Code § 47-3303; *see also National Trust for Historic Preservation v. District of Columbia*, 498 A.2d 574, 576 (D.C. 1985) (section 47-3307 "precludes equitable relief when there is an adequate remedy at law and ensures that the requirements of D.C. Code § 47-3303, that taxes be paid before they are challenged, is not circumvented.").[9]

---

[8] "Our review of the Tax Division's decisions is the same as in other civil cases that are tried without a jury. As to conclusions of law, we will not overturn the trial court's holding unless it is erroneous." *Chesapeake & Potomac Tel. Co., supra*, 516 A.2d at 184 (citations omitted).

[9] There is no dispute that the Carriers have an adequate remedy at law. Upon payment of the tax, the Carriers may obtain judicial review of the assessment:

> Any person aggrieved by any assessment by the District of any [gross receipts tax] . . . or penalties thereon, may

The Carriers do not dispute that they failed to fulfill the jurisdictional requirements of section 47-3307 prior to commencing this action in Superior Court. Rather, the Carriers argue that section 47-3307 does not bar the instant suit because they are seeking declaratory relief and the statute only prohibits suits for injunctive relief. Even if the statute is applicable, the Carriers claim that Judge Barnes was correct in finding that equitable relief is nevertheless warranted because of the exceptional and extraordinary circumstances presented by the case.

Our first task then, is to determine whether the anti-injunction statute applies to declaratory relief as well as injunctive relief. We hold that it does. The generally recognized purpose of an anti-injunctive statute is to prevent disruptions in the flow of tax dollars to the state treasury for government operations and the provision of essential public services.[10] Although it is true that the

---

within 6 months after the date of such assessment appeal from the assessment to the Superior Court of the District of Columbia: *Provided, that such person shall first pay such tax together with penalties and interest due thereon to the D.C. Treasurer.*

D.C. Code § 47-3303 (1987) (emphasis added).

[10] *See Allen v. Regents*, 304 U.S. 439, 456 (1938) (Reed, J., concurring) ("The prompt collection of revenue is essential to good government. Summary proceedings are a matter of right. The Government has been sedulous to maintain a system of corrective justice. Any departure from the principle of "pay first and litigate later" threatens an essential safeguard to the orderly functioning of government.") (footnotes omitted); *Bull v. United States*, 295 U.S. 247, 259 (1935) ("taxes are the life-blood of government, and their prompt and certain availability an imperious need."); *Dows v. City of Chicago*, 78 U.S. 65, 66 (11 Wall.) (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is

language of section 47-3307 refers only to suits to "enjoin" the collection of any tax, we reject the Carriers' narrow interpretation of that term to preclude only injunctive relief, for declaratory relief "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended" in the very same manner that an injunction would. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943).

Undoubtedly, declaratory relief may just as well involve a mere declaration of the parties' rights without hampering or restraining the collection of taxes.[11] *Id.* at 299. However, even where declaratory relief involves only a declaration that a tax regulation is invalid, the threat of a lawsuit to enforce that judgment effectively restrains

---

of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public."); *see also Maricopa v. Chatwin*, 499 P.2d 190, 197 (Ariz. Ct. App. 1972); *Pacific Gas & Electric v. State Bd. of Equalization*, 611 P.2d 463, 467, 165 Cal. Rptr. 122, 126 (Cal. 1980) (en banc); *District of Columbia v. Keyes*, 362 A.2d 729, 737 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977); *American Can Co. v. McCanless*, 193 S.W.2d 86, 88 (Tenn. 1946).

[11] Clearly, however, that is not the situation here. Although the Carriers would have us look away, we cannot ignore the realities existing outside the fine legal parameters of this case: the Carriers benefited from the protections afforded by the preliminary injunction, *pendente lite*, granted in Judge Barnes' Order of December 3, 1987, which order, of course, was subsumed by the declaratory judgment order of November 11, 1987. *See General Motors Corp. v. Miller Buick, Inc.*, 467 A.2d 1064, 1070 (Md. 1983); *Theis v. San Antonio*, 555 S.W.2d 931, 933-34 (Tex. Civ. App. 1977); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 (1973).

the government's ability to assess and collect the tax in a manner that is just as coercive as an injunction, though less immediate.[12] In other words, for all practical purposes, the government is equally precluded from assessing and collecting the tax whether it is injunctive or declaratory relief that is granted. In this context then, we fail to see any distinction between the two types of anticipatory relief that warrants dissimilar treatment under section 47-3307.

Furthermore, a contrary construction of section 47-3307 would undermine the purpose of the statute by condoning prepayment interference with the collection of taxes in one context, declaratory relief, and condemning it in another, injunctive relief. We doubt that Congress intended such an arbitrary result. Finally, our interpretation comports with D.C. Code § 47-3303 (1987).[13]

In holding that section 47-3307 applies to declaratory relief, we adopt the position taken by the Supreme Court in *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982), where the Court decided that the federal anti-injunction act prohibited both injunctive and declaratory relief,

> because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax

---

[12] "A declaratory judgment is one which determines and declares the rights of the parties without being immediately coupled with a coercive degree." *McIntosh v. Washington*, 395 A.2d 744, 748 (D.C. 1978) (citation omitted).

[13] *See supra* note 9, at 10-11. Section 47-3303 requires taxpayers to pay the assessment before they can challenge it in a suit for a refund.

> officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act.

Id. at 408. Although the principles of comity and federalism played a role in the Court's decision to withhold equitable relief, we do not agree with the Carriers' contention that our analogy to the federal statute is therefore inapt. The tenet disfavoring the issuance of federal injunctions against the collection of taxes by state government evolved from the more universal principle that courts of equity should refrain from interposing equitable relief in cases involving the collection of taxes absent clear proof that there is no adequate remedy at law. *State Railroad Tax Cases*, 92 U.S. 663, 673-74 (1876); *Cheatham v. United States*, 92 U.S. 561, 562-63 (1876); *Dows, supra*, 78 U.S. at 67. For all of the foregoing reasons, we hold that section 47-3307 applies with equal force to bar suits for injunctive and declaratory relief before payment of the challenged assessment.

III.

In light of our determination that section 47-3307 applies to prepayment declaratory relief, the Carriers would urge us to find that declaratory relief is warranted nevertheless because of the "exceptional and extraordinary circumstances" surrounding this case, citing this court's decision in *District of Columbia v. Green*, 310 A.2d 848, 852 (D.C. 1973) (quoting from *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)).[14] Although the language in *Green* guided the

---

[14] In *Standard Nut*, the Supreme Court expanded the exception under the federal anti-injunction statute to permit suits to enjoin the collection of the tax where:

> the complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist *special*

decision below,[15] we hold that the proper standard for determining whether equitable relief may be obtained against the collection of any tax requires: 1) a finding that "under no circumstances could the Government ultimately prevail," and 2) that "equity jurisdiction otherwise exists," that is, proof of irreparable injury and inadequacy of the legal remedy. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962); *see, e.g.*,

---

> *and extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence . . . .

Supra, 284 U.S. at 509 (citations omitted) (emphasis added).

[15] Judge Barnes first dealt with the jurisdictional issue in her Order of Dec. 3, 1987, granting the Carriers' motion for preliminary injunction. She ruled that:

> [the] facts, coupled with plaintiffs' showing of irreparable harm and injury, its likelihood of prevailing on merit, its strong argument regarding public policy and the lack of an adequate remedy at law demonstrate that the facts and circumstances herein are extraordinary and exceptional warranting equitable relief from this Court.

She addressed the issue again in her Order of January 27, 1988, on the District's motion to dismiss. Citing *Green, supra,* she found that:

> facts before the Court reveal a new and first-time legislation, initially passed as an emergency legislation (Act 7-54) requiring the imposition, retroactively to July 1, 1986, of a gross receipts tax at the rate of 6.7% on certain telecommunications companies engaged in the providing of interstate and foreign toll telephone service. The Act appears to be in response to the historic and significant structure changes in telecommunications resulting from the divestiture of AT & T . . . and the tax consequences of these changes.

Judge Barnes denied the motion; apparently she deemed this novel and historic turn of events sufficiently exceptional and extraordinary to warrant equitable relief.

IRS v. Shapiro, 424 U.S. 614, 627 (1976); *Bob Jones University v. Simon*, 416 U.S. 725, 744-45 (1974); *see also District of Columbia v. Keyes*, 362 A.2d 729, 737 & n.19 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977). Because we find that the Carriers did not meet the first prong of the *Williams Packing* test, we reverse.

The appellants in *Green* challenged the constitutionality of a statute utilizing a "stairstep" approach to increase the overall assessment levels for single-family residential properties. *Supra*, 310 A.2d at 852. Because the "jurisdictional points [were] not pressed with vigor . . . , each of the parties preferring a decision on the merits," the court "simply point[ed] out" that it accepted the trial court's finding of "exceptional and extraordinary" circumstances, and referred to a passage in *Standard Nut*. *See id.* The Carriers urge us now to reply on this language; we decline to do so. The holding in *Green* that the court had jurisdiction was based upon the compelling equities of that particular case. We do not deem the *Green* court's reference to *Standard Nut* to have enunciated a substantive test to be followed thereafter in determining jurisdiction over cases involving injunction against the collection of taxes.[16]

---

[16] We note with profound regret that this case marks at least the third time the District of Columbia has briefed the issue of lack of jurisdiction under the anti-injunction statute on appeal, but then has subsequently requested a decision on the merits nonetheless. *See 1776 K Street Associates v. District of Columbia*, 446 A.2d 1114, 1114 n.1 (D.C. 1982) ("While requesting a decision on the merits, 'in the public interest' [the District] ha[s] appropriately noted that suits to enjoin the collection of taxes are prohibited . . . ."); *Green, supra*, 310 A.2d at 852 (the "jurisdictional points are not pressed with vigor here, each of the parties preferring a decision on the merits."). At a minimum, this strategy can lead to inadequate briefing, for example, none of the briefs

This court's subsequent decision in *District of Columbia v. Keyes*, concurred in by the author of *Green*, supports this view and is wholly consistent with our adoption of the *Williams Packing* standard. 362 A.2d at 737; *cf. 1776 K Street Associates, supra*, 446 A.2d at 1117 (Ferren, J., concurring in judgment) (citing *Keyes* on issue of whether equitable relief may be granted). *But see 1776 K Street Associates, supra*, 446 A.2d at 1114 n.1 (citing *Green* for proposition that notwithstanding the anti-injunction statute, equitable relief is warranted in "exceptional and extraordinary circumstances"). In holding that the anti-injunction statute barred the suit because the appellant failed to pay the tax prior to bringing suit, the court determined that injunctive relief "may be granted only in the most *exceptional and stringent* circumstances," citing *Bob Jones University, supra*, 416 U.S. 725, and *Williams Packing, supra*, 370 U.S. 1. *Keyes, supra*, 362 A.2d at 737 n.19 (emphasis added).

Williams Packing unequivocally gutted the "special and extraordinary circumstances" exception created in *Standard Nut* and replaced it with a far more stringent standard which requires the taxpayer to prove that the government has no chance of success on the merits in addition to some irreparable injury. *Supra*, 370 U.S. at 6-7; *see also Commissioner v. Shapiro*, 424 U.S. 614,

---

filed in *Green* made note of the fact that *Standard Nut* was overruled in *Williams Packing*. At worst, it requires this court to overlook an express statutory limitation on the exercise of its judicial powers, a request we do not take lightly. *See* the District's Brief at 22 ("The anti-injunction statute is jurisdictional; absent compliance with the prerequisites for suits, the statute completely deprives the courts of jurisdiction, except in extremely narrow circumstances," which the District argued were not present here.).

627 (1976); *Commissioner v. "Americans United" Inc.*, 416 U.S. 752, 758 (1974); *Bob Jones University, supra*, 416 U.S. at 744-45.[17]

IV.

The remaining issue then is whether the Carriers have met the standards of *Williams Packing*. Under the first prong of the *Williams Packing* two-part standard, the taxpayer must show "at the time of the suit" that the government "under the most liberal view of the law and the facts," cannot establish its claim. *Williams Packing, supra*, 370 U.S. at 7; *see Shapiro, supra*, 424 U.S. at 627. In other words we will not look to the outcome below in determining whether the Carriers have met their burden under the first prong.

It is clear beyond a doubt that the Carriers failed to show that under no circumstances could the District have ultimately prevailed.[18] Without deciding the merits, we think that the Carrier's claims of unconstitutionality are "sufficiently debatable to foreclose any notion" that under no circumstances could the District ultimately prevail. *Bob Jones University, supra*, 416 U.S. at 749.

---

[17] As the Supreme Court noted in *Bob Jones University*:

> *Standard Nut* was such a significant deviation from precedent . . . Read literally, the Court's opinion effectively repealed the [federal Anti-Injunction] Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage. The incongruity of this position has not escaped notice. It undoubtedly led directly to the Court's re-examination of the requirements of the Act in *Williams Packing*, the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language.

Supra, 416 U.S. at 744-45.

[18] *See Goldberg v. Sweet*, 109 S. Ct. 582 (1989).

V.

The "pay and sue" rule is no empty shibboleth, and only in "extraordinary and stringent" circumstances should courts take exception to its dictates. We recognize that our decision gives section 47-3307 almost literal effect, and by so holding may impose substantial hardship on taxpayers here in the District notwithstanding available postenforcement judicial review. To hold otherwise, however, would cause harm far beyond the confines of this case; for if equity is permitted to restrain the collection of taxes as the parties sorted through their respective rights, the burden of meeting the financial shortfall would rest on the shoulders of innocent taxpayers in the form of additional taxes and/or inferior or reduced public services. We believe this is the result the statute is designed to prevent.

Reversed.

TITLE 47

TAXATION AND FISCAL AFFAIRS.

D.C. Code § 47-2501. Gas, electric lighting, telephone and telecommunications companies.

(a) Before the 21st day of each calendar month, each gas, electric lighting, and telephone company that sells public utility services or commodities within the District of Columbia shall:

(1) File an affidavit with the Mayor indicating the amount of its gross receipts for the preceding calendar month from the sale of public utility services and commodities within the District of Columbia; and

(2) Pay to the Mayor 6.7% of these gross receipts.

(b) (1) For the period beginning July 1, 1986, and ending February 28, 1989, each telecommunication company not subject to the tax imposed by subsection (a) of this section shall:

(A) Report by affidavit filed with the Mayor the amount of its monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received; and

(B) Pay to the Mayor 6.7% of these gross receipts.

(C) [Added 1989] To prevent actual multi-state taxation of the sale of toll telecommunication service, for the month beginning July l, 1986, and for each succeeding month, any telecommunication company, upon proof that it has paid a properly due excise, sales, use, or gross receipts tax in another jurisdiction on a sale that is subject to taxation under this act, shall be allowed a credit against the tax for the amount paid, but in no event shall the credit permitted under this section exceed the tax imposed under this act.

(2) For each calendar month in the period beginning after September 30, 1987, and ending February 28, 1989, each

telecommunication company shall pay the gross receipts tax imposed by this subsection before the 21st day of the succeeding calendar month. The affidavits for each calendar month shall be filed at the time payment is made or on the 20th day of the succeeding calendar month, whichever is earlier.

(3) (A) For the period beginning July l, 1986, and ending August 31, 1987, the gross receipts tax imposed by this subsection shall be due on October 1, 1987. The tax for this period shall be paid in 2 equal installments before November 1, 1987, and before January 1, 1988. The Mayor may, upon written application made before the date prescribed for payment of the tax, grant a reasonable extension of time for paying the tax whenever good cause exists for the extension. The affidavits for each calendar month of this period shall be filed at the time the first installment payment is made or on October 30, 1987, whichever is earlier.

(B) For the period beginning September 1, 1987, and ending September 30, 1987, the gross receipts tax imposed by this subsection shall be paid before October 21, 1987. The required affidavit shall be filed at the time the payment is made or on October 20, 1987, whichever is earlier.

(C) Each telecommunication company subject to the gross receipts tax imposed by this subsection for the period beginning July 1, 1986, and ending September 30, 1987, shall be allowed a credit against the gross receipts tax imposed by this subsection for the amount of personal property tax that is allocable to the period beginning July 1, 1986, and ending September 30, 1987, and that is paid pursuant to § 47-1501, and subchapter II of Chapter 15 of this title.

(D) [Added 1989] Beginning July 1, 1986, a telecommunication company subject to the tax imposed by this act may be allowed an alternate method of reporting its monthly gross receipts upon showing, to the satisfaction of the Mayor that the telecommunication company does not have the capability to identify the jurisdiction of origination or termination of a particular toll telecommunication service. This showing shall be made by a written petition to the Mayor, which shall include the factual basis for the com-

pany's inability to identify the jurisdiction of origination or termination of a particular toll telecommunication service, with supporting documentation, and an alternative method of reporting for the services for which the company is unable to identify the jurisdiction of origination or termination that the company believes is reasonable and equitable, with supporting documentation. The Mayor may employ a reasonable and equitable alternate method for reporting a telecommunication company's gross receipts from this service based on information submitted pursuant to this subsection or any other information made available to the Mayor. Any alternate method for reporting a telecommunication company's gross receipts that is authorized by the Mayor shall apply only to the service for which the company is unable to identify the jurisdiction of origination or termination and shall not affect the reporting of any other gross receipts. Nothing in this section shall be deemed tc relieve the obligation of a telecommunication company to pay the tax imposed by this act.

(4) Gross receipts from the sale by any telecommunication company of toll telecommunication services for resale to any other telecommunication company subject to the gross receipts tax under this subsection shall be exempt from the gross receipts tax under this subsection.

(5) For purposes of this subsection:

(A) The term "telecommunication company" includes and is not limited to every person, as defined in § 47-2001(i), and lessee of a person who provides for the transmission or reception within the District of Columbia of any form of toll telecommunication service for a consideration.

(B) The term "toll telecommunication service" means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication; or the transmission or reception of any sound, vision, or speech communication that entitles a person, as defined in § 47-2001(i), upon the payment of a periodic charge, which is determined as a flat amount or upon the basis of total elapsed transmission time,

to an unlimited number of communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area that is outside the local telephone system area in which the station providing this service is located.

(c) Notwithstanding any other provision of law, each gas, electric lighting, telephone company, and telecommunication company subject to the tax imposed by this section shall pay, in addition to the gross receipts tax, the franchise tax imposed by Chapter 18 of this title, the real property tax imposed by Chapter 8 of this title, and the personal property tax imposed by § 47-1501, and subchapter II of Chapter 15 of this title, to the extent provided in § 47-1508.

(d) Before February 1, 1988, the Mayor shall:

(1) Report to the Council on the tax treatment of telecommunication and related services in other jurisdictions; and

(2) Make recommendations as to what, if any, additional telecommunication and related services should be subject to tax by the District.

(e) The Mayor shall issue retroactive and prospective rules necessary to carry out the provisions of this section in accordance with § 1-1506.

(July 1, 1902, 32 Stat. 619, ch. 1352, § 6, par. 5; July 26, 1939, 53 Stat. 1107, ch. 367, title IV, § 2(a); May 18, 1954, 68 Stat. 118, ch. 218, title XIV, § 1401; July 24, 1956, 70 Stat. 599, ch. 669, § 8(a); Oct. 21, 1972, 86 Stat. 1016, Pub. L. 92-518, title III, § 303(a); 1973 Ed., § 47-1701; Oct. 21, 1975, D.C. Law 1-23, title VI, § 501(a)(1), 22 DCR 2105; Sept. 13, 1980, D.C. Law 3-95, § 201(a), (b), 27 DCR 3509; June 22, 1983, D.C. Law 5-14, § 102, 30 DCR 2632; Oct. 1, 1987, D.C. Law 7-25, § 2, 34 DCR 5068; May 23, 1989, D.C. Law 8-4, § 22, 36 DCR 2375; Sept. 20, 1989, D.C. Law 8-26, § 22, 36 DCR 4723.)

D.C. Code § 47-1508. Exemptions [Personal Property Tax]

(a) The following personal property shall be exempt from the tax imposed by this act:

* * *

(3) Any motor vehicle or trailer registered according to §§ 40-101, 40-102, and 40-104 to 40-106, except that special equimment mounted on a motor vehicle or trailer and not used primarily for the transporation of persons or property shall be taxed as tangible personal property as provided by law.

(A) The personal property of any gas, electric lighting, or telephone company regulated under Chapters 1-10 of Title 43, if the gas, electric lighting, or telephone company is subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by subchapter II of Chapter 15 of this title.

(B) The personal property of any telecommunication company, as defined in § 47-2501 (b) (5) (A), used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by subchapter II of Chapter 15 of this title, except that if the personal property is used both to produce receipts subject to a gross receipts tax in the District and receipts not subject to a gross receipts tax in the District, then the personal property tax exemption shall be allocated in accordance with rules issued by the Mayor.

(4) Nothing contained within this act, nor any prior act of Congress relating to the District of Columbia, shall be deemed to impose upon any person, firm, association, company, or corporation a tax based upon tangible personal property owned and stored by the person in a public warehouse in the District of Columbia for a period of time no longer than is necessary for the convenience or exigencies of reshipment and transportation to its destination outside the District of Columbia.

(b) The Mayor shall issue rules necessary to carry out the provisions of subsection (a) (3) (A) and (B) of this section in accordance with subchapter I of Chapter 15 of Title 1. (July 1, 1902, 32 Stat. 620, ch. 1352, § 6, par. 10; Apr. 28, 1904, 33 Stat. 564, ch. 1815; Mar. 4, 1913, 37 Stat. 1006, ch. 150,

§ 10; Sept. 1, 1950, 64 Stat. 576, ch. 836, § 3; May 18, 1954, 68 Stat. 112, ch. 218, §§ 605, 1001, 1002; Sept. 4, 1957, 71 Stat. 606, Pub. L. 85-281, § 6; 1973 Ed., § 47-1208; Feb. 28, 1987, D.C. Law 6-212, § 19(a), 34 DCR 850; Oct. 1, 1987, D.C. Law 725, §3, 34 DCR 5068.)

D.C. Code § 47-2005. Exemptions [Sales Tax].

Gross receipts from the following sales shall be exempt from the tax imposed by this chapter:

* * *

(5)Sales of property purchased by a telecommunication company as defined in § 47-2501 (b) (5) (A), utility, or public-service company for use or consumption in furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipts tax or mileage tax in force in the District for the period of time covered by any return required to be filed by the provisions of this chapter. If the property purchase is used both to produce receipts subject to a gross receipts tax or mileage tax in the District and receipts not subject to a gross receipts or mileage tax in the District, then this sales tax exemption shall be allocated in accordance with rules issued by the Mayor.

* * *

D.C. Code § 47-2005. Exemptions [Use Tax].

The tax imposed by this chapter shall not apply to the following:

(1)Sales upon which taxes are properly collected under Chapter 20 of this title;

* * *

D.C. Law 7-25 (October 1, 1987)

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this act may be cited as the "Gross Receipts Tax Amendment Act of 1987"

Sec. 2. Section 6(5)of An Act Making appropriations to provide for the expense of the government of the District of Columbia for the fiscal year ending June thirtieth, nine-

teen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 619; D.C. Code, sec. 47-2501), is amended to read as follows:

"(5)(A) Before the 21st day of each calendar month, each gas, electric lighting, and telephone company that sells public utility services or commodities within the District of Columbia shall:

"(i) File an affidavit with the Mayor indicating the amount of its gross receipts for the preceding calendar month from the sale of public utility services and commodities within the District of Columbia; and

"(ii) Pay to the Mayor 6.7% of these gross receipts.

"(B)(i) Beginning July 1, 1986, each telecommunications company not subject to the tax imposed by subparagraph (A) of this paragraph shall:

"(I) Report by affidavit filed with the Mayor the amount of its monthly gross receipts from the sale of toll telecommunication services that originate from or terminate on telecommunication equipment located in the District and for which a toll charge or periodic charge is billed to an apparatus, telephone, or account in the District, to a customer location in the District, or to a person residing in the District, without regard to where the bill for the service is physically received; and

"(II) Pay to the Mayor 6.7% of these gross receipts.

"(ii) For each calendar month beginning after September 30, 1987, each telecommunication company shall pay the gross receipts tax imposed by this subparagraph before the 21st day of the succeeding calendar month. The affidavits for each calendar month shall be filed at the time payment is made or on the 20th day of the succeeding calendar month, whichever is earlier.

"(iii)(I) For the period beginning July 1, 1986, and ending August 31, 1987, the gross receipts tax imposed by this subparagraph shall be due on the date that the Gross Receipts Tax Amendment Act of 1987 takes effect. The tax for this period shall be paid in 2 equal installments before November 1, 1987, and before January 1, 1988. The Mayor

may, upon written application made before the date prescribed for payment of the tax, grant a reasonable extension of time for paying the tax whenever good cause exists for the extension. The affidavits for each calendar month of this period shall be filed at the time the first installment payment is made or on october 30, 1987, whichever is earlier.

"(II) For the period beginning September 1, 1987, and ending September 30, 1987, the gross receipts tax imposed by this subparagraph shall be paid before October 21, 1987. The required affidavit shall be filed at the time the payment is made or on October 20, 1987, whichever is earlier.

"(III) Each telecommunication company subject to the gross receipts tax imposed by this subparagraph for the period beginning July 1, 1986, and ending September 30, 1987, shall be allowed a credit against the gross receipts tax imposed by this subparagraph for the amount of personal property tax that is allocable to the period beginning July 1, 1986, and ending September 30, 1987, and that is paid pursuant to An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 617; D.C. Code, sec. 47-1501), and the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*).

"(iv) Gross receipts from the sale by any telecommunication company of toll telecommunication services for resale to any other telecommunication company subject to the gross receipts tax under this subparagraph shall be exempt from the gross receipts tax under this subparagraph.

"(v) For purposes of this subparagraph:

"(I) The term "telecommunication company" includes and is not limited to every person, as defined in section 109 of the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 113; D.C. Code, sec. 47-2001(i)), and lessee of a person who provides for the transmission or reception within the District of Columbia of any form of toll telecommunication service for a consideration.

"(II) The term "toll telecommunication service" means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication; or the transmission or reception of any sound, vision, or speech communication that entitles a person, as defined in section 109 of the District of Columbia Sale Tax Act, approved May 27, 1949 (63 Stat. 113: D.C. Code, sec. 47-2001(i)), upon the payment of a periodic charge, which is determined as a flat amount or upon the basis of total elapsed transmission time, to an unlimited number of communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area that is outside the local telephone system area in which the station providing this service is located.

"(C) Notwithstanding any other provision of law, each gas, electric lighting, telephone company, and telecommunication company subject to the tax imposed by this paragraph shall pay, in addition to the gross receipts tax, the franchise tax imposed by the District of Columbia Income and Franchise Tax Act of 1947, approved July 16, 1947 (61 Stat. 331; D.C. Code, sec. 47-1801.1 *et. seq.*), the real property tax imposed by the District of Columbia Real Property Tax Revision Act of 1974, approved September 3, 1974 (88 Stat. 1052; D.C. Code sec. 47-801 *et. seq.*), and the personal property tax imposed by An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 617; D.C. Code, sec. 47-1501), and the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*), to the extent provided in section 6(10) of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 620; D.C. Code, sec. 47-1508).

"(D) Before February 1, 1988, the Mayor shall:

"(i) Report to the Council on the tax treatment of telecommunication and related services in other jurisdictions; and

"(ii) Make recommendations as to what, if any, additional telecommunication and related services should be subject to tax by the District.

"(E) The Mayor shall issue retroactive and prospective rules necessary to carry out the provisions of this paragraph in accordance with section 107 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Code, sec. 1-1506.".

Sec. 3. Section 6(10) of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 620; D.C. Code, sec. 47-1508), is amended as follows:

(a) By designating the existing text as subparagraph (A);

(b) By adding a new sub-subparagraph THIRD (A) to subparagraph (A) to read as follows:

"THIRD(A). The personal property of any gas, electric lighting, or telephone company regulated under An Act making appropriations to provide for the expenses of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and fourteen, and for other purposes, approved March 4, 1913 (37 Stat. 974; D.C. Code, sec. 43-101 *et. seq.*), if the gas, electric lighting, or telephone company is subject to a gross receipts tax in force in the District for the period of time or for any portion of the time covered by any return required to be filed by the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code, sec. 47-1521 *et. seq.*),";

(c) By adding a new sub-subparagraph THIRD(B) to subparagraph (A) to read as follows:

"THIRD(B). The personal property of any telecommunication company, as defined in section 6(5)(B)(v)(I), used or consumed in furnishing a service if the receipts from furnishing the service are subject to a gross receipts tax in force in the

District for the period of time or for any portion of the time covered by any return required to be filed by the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code sec. 47-1521 *et. seq.*), except that if the personal property is used both to produce receipts subject to a gross receipts tax in the District and receipts not subject to a gross receipts tax in the District, then the personal property tax exemption shall be allocated in accordance with rules issued by the Mayor."; and

(d) By adding a new subparagraph (B) to read as follows:

"(B) The Mayor shall issue rules necessary to carry out the provisions of sub-subparagraphs THIRD(A) and THIRD(B) in accordance with Title I of the District of Columbia Administrative Procedure Act, approved October 21 1968 (82 Stat. 1203; D.C. Code, sec. 1-1501 *et. seq.*)."

Sec. 4. Section 128(f) of the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 115; D.C. Code, sec. 47-2005(5)), is amended to read as follows:

"(f) Sales of property purchased by a telecommunication company as defined in section (6)(5)(B)(v)(I) of An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902 (32 Stat. 619; D.C. Code, sec. 47-2501), utility, or public-service company for use or consumption in furnishing a service or commodity if the receipts from furnishing the service or commodity are subject to a gross receipts tax or mileage tax in force in the District for the period of time covered by any return required to be filed by the provisions of this title. If the property purchased is used both to produce receipts subject to a gross receipts tax or mileage tax in the District and receipts not subject to a gross receipts or mileage tax in the District, then this sales tax exemption shall be allocated in accordance with rules issued by the Mayor."

Sec. 5. Section 216(a) of the District of Columbia Use Tax Act, approved, May 27, 1949 (63 Stat. 127; D.C. Code, sec. 47-2206(I)), is amended to read as follows:

"(a) Sales upon which taxes are properly collected under the District of Columbia Sales Tax Act, approved May 27, 1949 (63 Stat. 115; D.C. Code, sec. 47-2001 *et. seq.*);".

Sec. 6. Applicability.

(a) Sections 2, 3(a), 3(d), and 5 shall apply as of the effective date of this act.

(b) Section 4 shall apply to taxable periods beginning after September 30, 1987.

(c) Section 3(b) and 3(c) shall apply for the personal property tax year, as defined under section 2(5) of the Personal Property Tax Amendment Act of 1986, effective February 28, 1987 (D.C. Law 6-212; D.C. Code, sec. 47-1521 *et. seq.*), or portion of a personal property tax year, occurring after September 30, 1987.

Sec. 7. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1987 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).